Supreme Court, U.S.
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No. 93-1779

In the Supreme Court of the United States

October Term, 1993

William A. Calvo, III,

Petitioner

- against -

The Florida Bar

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

APPENDIX TO REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: September 15th, 1994

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Because of the word-processing program used, footnotes are numbered sequentially throughout the whole appendix, rather than following the original numeration of each separate document. The initials FHT in the Appeal Brief refer to Final Hearing Transcript.

Docket of Proceedings Below Prior to Appeal

Number & Date	Description
1/August 9, 1991	Complaint
2/August 9, 1991	Complainant's Request for Admissions
3/August 16, 1991	Order Designating Referee
4/August 31, 1991	Respondent's Answer, Defenses & Mitigating Factors
5/August 31, 1991	Respondent's Response to Request for Admissions
6/September 17, 1991	Complainant's Second Request for Admissions
7/September 20, 1992	Referee's Order Setting Final Hearing Date on November 18, 1991
8/September 25, 1991	Complainant's Motion to Limit Issues at Trial
9/September 25, 1991	Memorandum of Law in Support of Complainant's Motion to Limit Issues at Trial
10/September 28, 1991	Respondent's 1st Request for Production of Documents & Admissions
11/_____	Missing Transcript of Hearing on Complainant's Motion to Limit Issues at Trial

Number & Date	Description
12/October 3, 1991	Respondent's Opposition to Motion to Limit Issues at Trial
13/September 21, 1991[1]	Complainant's Reply to Respondent's Opposition to Motion to limit Issues at Trial
14/October 9, 1991	Respondent's Motion to Compel Production of Documents and to Provide Admissions on Expedited Basis
15/October 10, 1991	Respondent's Motion to Dispense with Oral Argument or to Permit Participation by Telephone with Reference to Motion to Limit Issues at Trial
16/_____	Missing Transcript of Hearing on Respondent's Motion to Compel Production of Documents and to Provide Admissions on Expedited Basis
17/October 24, 1991	Complainant's Response to the Respondent's 1st Requests for Production of Documents or Admissions

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1. Obviously misdated since it replies to materials filed on October 3, 1991.

Number & Date	Description
18/October 28, 1991	Responsive Supplement to Memorandum in Opposition to Complainant's Motion to Limit Issues at Trial
19/November 4, 1991	Respondent's Motion to Compel Production of Documents, Admissions, and to Postpone Final Hearing Date
20/November 13, 1991	Complainant's Response to Respondent's Motion to Compel Production of Documents, Admissions, and to Postpone Final Hearing Date
21/November 20, 1991	Respondent's Reply to Complainant's Response to Respondent's Motion to Compel Production of Documents, Admissions, and to Postpone Final Hearing Date
22/November 30, 1991	Referee's Order Granting Complainant's Motion to Limit Issues at Trial
23/December 2, 1991	Referee's Order Re-Setting Final Hearing
24/December 4, 1991	Complainant's Motion for a Continuance of Final Hearing

Number & Date	Description
25/December 10, 1991	Respondent's 1st Interrogatories to the Complainant
26/_____	Missing Transcript of Hearing on Complainant's Motion to Amend its Complaint
27/December 17, 1991	Complainant's Amended Complaint
28/December 20, 1991	Order Granting Complainant Leave to Amend Complaint
29/December 23, 1991	Notice of Respondent's Appeal of Order Limiting Issues at Trial
30/December 31, 1991	Complainant's Motion to Dismiss Appeal of Order Limiting Issues at Trial
31/January 7, 1992	Respondent's Motion for Stay of Final Hearing Pending Appeal of Referee's Order Limiting Issues at Trial
32/January 8, 1992	Opposition to Complainant's Motion to Dismiss Appeal of Order Limiting Issues at Trial
33/January 10, 1992	Respondent's Motion to Permit Filing of More than 30 Interrogatories and to Require Response at Least 10 days Prior to Final Hearing

Number & Date	Description
34/January 15, 1992	Correspondence to Supreme Court from Respondent
35/January 21, 1992	Motion for Tolling of Time to File Brief Pending Determination of Motion to Dismiss Appeal
36/January 22, 1992	Motion to Supplement Record for Purposes of Appeal
37/January 23, 1992	Referee's Order Denying Respondent's Motion to Compel Admissions Referee's Order Staying Final Hearing Pending Appeal
38/January 24, 1992	Complainant's Motion for a Protective Order Prohibiting All of the Respondent's Interrogatories
39/January 24, 1992	Order Granting Motion for Tolling of Time Pending Determination of Motion to Dismiss Appeal
40/January 27, 1992	Complainant's Response to Respondent's Motion to Supplement Record for Purposes of Appeal
41/January 27, 1992	Complainant's Response to Respondent's Motion to Permit Filing of More than 30 Interrogatories and to Require

Number & Date	Description
	Response at Least 10 Days Prior to Final Hearing
42/February 3, 1992	Respondent's Reply to Response to Motion to Supplement Record for Purposes of Appeal
43/February 3, 1992	Respondent's Reply to Response to Motion to Permit Filing of More Than 30 Interrogatories
44/February 12, 1992	Supreme Court's Order Denying Motion to Dismiss Appeal of Referee's Order Limiting Issues at Trial
45/February 18, 1992	Referee's Order Granting Complainant's Motion for a Protective Order, Limiting Respondent to Three Interrogatories to the Complainant
46/February 18, 1992	Referee's Order Denying Motion to Supplement record for Purposes of Appeal
47/March 3, 1992	Letter to Referee from Supreme Court Regarding Status
48/March 4, 1992	Respondent-Appellant's Brief Appealing Decision of Referee Limiting Issues at Trial
49/March 4, 1992	Supreme Court Brief Scheduling Order

Number & Date	Description
50/March 5, 1992	Filing of Technical Corrections to Respondent's March 4, 1992 Brief
51/March 10, 1992	Complainant's Limited Answer to 3 of the Interrogatories Propounded by the Respondent
52/March 10, 1992	Complainant's Interrogatories to the Respondent
53/April 9, 1992	Complainant's Answer Brief on Appeal of Order Limiting Issues at Trial
54/April 23, 1992	Respondent's Reply Brief on Appeal of Order Limiting Issues at Trial
55/April 27, 1992	Respondent's Motion for Partial Voluntary Dismissal of Complaint
56/April 29, 1992	Notice of Submission of Appeal to Supreme Court Without Oral Argument
57/May 1, 1992	Respondent's Motion to Supplement Record
58/May 1, 1992	Respondent's Counter Motion to Dismiss Complaint or for Summary Judgment
59/May 6, 1992	Complainant's Response to Motion to Supplement Record

Number & Date	Description
60/May 8, 1992	Complainant's Response to Respondent's Counter Motion to Dismiss Complaint or for Summary Judgment
61/May 13, 1992	Respondent's Reply to Complainant's Response on Motion to Supplement Record
62/May 13, 1992	Order Granting Motion to Supplement Record
63/May 14, 1992	Respondent's Reply to Complainant's Response to Respondent's Counter Motion to Dismiss Complaint or for Summary Judgment
64/July 2, 1992	Decision of Supreme Court rejecting Referee's Order Limiting Issues at Trial
65/July 2, 1992	Cover Letter to Referee re Decision of Supreme Court rejecting Referee's Order Limiting Issues at Trial
66/July 13, 1992	Complainant's Notice of Status Conference
67/_____	Missing Transcript of Status Conference on July 15, 1992
68/_____	Missing Transcript of Hearing on Respondent's Counter Motion to

Number & Date	Description
	Dismiss Complaint or for Summary Judgment on July 17, 1992
69/July 17, 1992	Complainant's Notice of Final Hearing
70/July 20, 1992	Complainant's Re-notice of Final Hearing
71/July 20, 1992	Referee's order Granting Complainant's Motion for Partial Voluntary Dismissal of Complaint
72/July 24, 1992	Memorandum of Law in Support of Complainant's Response to the Respondent's Counter Motion to Dismiss Complaint or for Summary Judgment
73/July 27, 1992	Respondent's Motion to Strike Unauthorized Memorandum of Law
74/July 31, 1992	Complainant's Response to Respondent's Motion to Strike Unauthorized Memorandum of Law
75/August 5, 1992	Respondent's Reply to Complainant's Response to Respondent's Motion to Strike Unauthorized Memorandum of Law

Number & Date	Description
76/August 15, 1992	Referee's Order Denying the Respondent's Motion to Dismiss Complaint or for Summary Judgment and the Respondent's Complaint to Strike Unauthorized Memorandum
77/August 17, 1992	Correspondence from the Complainant on Behalf of Referee Requesting Record for use at September 14, 1992 Final Hearing
78/August 17, 1992	Respondent's Motion for Stay Pending Appeal
79/August 20, 1992	Notice of Appeal by Respondent of Order Denying Summary Judgment
80/August 21, 1992	Emergency Motion for Stay of Final Hearing Pending Appeal
81/August 27, 1992	Complainant's Response to Emergency Motion for Stay of Final Hearing Pending Appeal
82/August 27, 1992	Referee's Order Denying Emergency Motion for Stay of Final Hearing
83/August 31, 1992	Reply to Complainant's Response on Motion for Stay of Final Hearing Pending Appeal

Number & Date	Description
84/August 31, 1992	Respondent's Request for Judicial Notice
85/September 1, 1992	Motion for Tolling of Time to File Brief Pending Determination of Complainant's Motion to Dismiss Appeal
86/September 4, 1992	Complainant's Motion requesting Judicial Notice
87/_____	Missing Transcript of Hearing on September 8 Pertaining to Complainant's Request for Judicial Notice
88/September 8, 1992	SC Order Granting Motion to Toll Time Pending Appeal
89/September 9, 1992	SC Order Dismissing Appeal of Order Denying Summary Judgment, w/o Prejudice
90/September 10, 1992	Efforts made by Complainant to Obtain Materials Requested by the Respondent
91/September 12, 1992	Referee's decision granting Complainant's Request for Judicial Notice
92/September 12, 1992	Referee's decision on Respondent's Motion for Judicial Notice, denying Judicial Notice of the Requested Matters Not

Number & Date	Description
	Directly Dealing with Prior Proceedings in this Matter
93/September 12, 1992	Referee's decision refusing to admit introduction of excerpts of depositions of witnesses by the Securities and Exchange Commission in the Warehouse cases, but directing Complainant to make best efforts to obtain complete depositions from the Securities and Exchange Commission
94/September 14, 1992	Notice of Appearance by Larry D. Houston on Behalf of Respondent, in Place of G. Richard Chamberlin (Disqualified by Referee)
95/September 25, 1992	Affidavit of Complainant Regarding Costs
96/November 24, 1992	Affidavit of Complainant Regarding Costs
97/September 29, 1992	Affidavit of L. Linda Perkins Submitted by the Complainant re Testimony of Marvin Richmond at Final Hearing
98/December 10, 1992	Report of Referee

Number & Date	Description
99/December 10, 1992	Notice of Filing Record with Report of Referee
100/December 10, 1992	Six Volume Transcript of Final Hearing Proceedings
101/December 10, 1992	Petitioner's & Respondent's Exhibits Introduced at Final Hearing
102/December 28, 1992	Correspondence from Respondent Concerning Timing for Filing Notice of Appeal
103/December 28, 1992	Notice of Correct Address for Respondent

Excerpts from Record of Final Hearing

I. Federal Question

Record page/line

0019/

[Florida Bar Counsel]

"10 Finally, the Florida Bar will present
11 James Beasley, who will testify in his capacity
12 as an expert in the field of securities law
13 regarding the conduct that took place by the
14 Respondent in this case."

....

0294/

"8 MR. WHALEN: The Florida Bar the now calls
9 James Beasley as our witness.
10 MR. CALVO: We have certain motions we
11 would like to address at this point objecting to
12 his testimony and it's, of course, based on the
13 assumption what he is going to testify to are
14 securities law. This a not a securities
15 proceeding, it is a Bar proceeding.
16 We have a set of facts that we need to
17 establish and those facts may establish
18 violation of securities laws, maybe they won't.

I am hoping I can prove they wouldn't in any case, but that's not relevant.

The relevance is that those facts have to establish a violation of a single disciplinary rule -- Disciplinary Rule 1-102(a)(6) and that to the extent that his testimony relates to securities laws, that would not only not not

0295/

material, but could be prejudicial.

THE COURT: I will let him testify."

II. Deprivation of Right to Counsel

Page/Lines

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Thereupon:

The following proceedings were had:

MR. WHALEN: First of all, I am Steve Whalen, counsel for the Florida Bar.

MR. CALVO: I am William A. Calvo, III. I am the respondent.

MR. HOUSTON: I am Larry Houston. I am here appearing as co-counsel with Bill Calvo.

MR. CHAMBERLAIN: My name is Richard Chamberlain and I am also appearing on behalf of Mr. Calvo.

MR. WHALEN: At this point, Your Honor, I would like to make an objection. This is the first time Bar counsel had any notice whatsoever that there was other co-counsel in this case. There was no notice of appearance whatsoever, no pleadings filed, no nothing indicating they have co-counsel.

Mr. Calvo already indicated that Mr. Chamberlain is going to be a witness in this matter and I would want to invoke the rule that any person being a witness would not be present during testimony in this case.

THE COURT: Do you want to respond?

MR. CALVO: Yes, Your Honor. In fact I did

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indicate that my partners would help me with the questioning in a prior hearing. I don't specifically recall when it was when we were discussing it.

It certainly would be difficult to do my own testimony.

Secondly, I have absolutely no litigation experience. I have never done a trial. I will try to take the lead position but whatever errors I am making, they will assist me, if there is some procedural matter they are familiar with that and I am not.

The proceedings will be more fairly and more expeditiously decided if we are dealing with attorneys who know what they are doing.

I am very good in the things that I do I think but I know I have never done any litigation. Representing myself is all I have done.

MR. WHALEN: If I may, if he is talking of fairness, this is brought in Monday morning, the beginning of the hearing that he now has co-counsel, one that it is anticipated as being a witness if not by Mr. Calvo, then possibly in rebuttal by the Florida Bar.

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Mr. Calvo has made absolutely no notice to the Court and Bar counsel; either has Mr. Houston that he would be appearing as co-counsel.

I think it is improper and unfair and it is untimely.

MR. HOUSTON: What is the prejudice?

THE COURT: Do you have written notice of appearance as attorney?

MR. CHAMBERLAIN: I have written notice. I don't have a case number here. I am not sure I have it.

MR. WHALEN: If I might, for the record --

THE COURT: Are you going to address the fact that he might be a witness.

MR. CALVO: Your Honor, The Code of Professional Responsibility indicates a person's attorney ought not to be a witness in a case unless depriving him as a witness would result in prejudice to the defendant.

There is not an absolute prohibition against a person's counsel also being a witness. We have the code right here.

THE COURT: Show me where it says that.

MR. WHALEN: Mr. Chamberlain will be

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present during all the testimony that takes place here including Mr. Calvo and all the other witnesses which then he will have clear advantage should he have to testify depending on what is said in these proceedings.

Once again, I would certainly invoke the rule and I don't think it is proper or that it cures anything by at very morning at the beginning of the proceedings for Mr. Chamberlain to execute notices of appearance or Mr. Houston or anybody for that matter, any attorney.

This case has been going on for over a year and we get notice at 9:30 or 9:40 on the 14th of September that he now has co-counsel.

MR. CALVO: This is the rule.

THE COURT: Rule 4-3.7, Rules of Professional Conduct.

MR. WHALEN: If I may make a comment, Your Honor. I also notice in 4-3.7 (B) where it says, "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 4-1.7 or 4-1.9."

Mr. Chamberlain would be testifying about things when he was not a lawyer or not a partner

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with Mr. Calvo when they were unassociated. I think that would preclude him from testifying.

Number two, if you look at Part A, his testimony may very well go to the substance, not just a matter of formality of which he will be testifying to. I think it's improper but in any event, go ahead.

THE COURT: I think he would either have to be attorney for you or not be able to testify. So that would be my ruling, if he is going to be a witness which precludes him from being one of your attorneys in this matter.

MR. CALVO: I think he is essential for cross examination of Mr. Bremer because he has been involved and is the only one with

experience.
THE COURT: Are you saying you want to use him as a witness?[2]
MR. WHALEN: He very well may be a rebuttal witness. Mr. Calvo already indicated at our status conference on Friday that he was calling Mr. Chamberlain as a witness.
THE COURT: I think he will have to not act as one of the attorneys.
MR. CALVO: If I may --

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THE COURT: That would be my ruling.
MR. CALVO: Your Honor, if I might respond to that.
I have indicated that I intend to call Mr. Whalen as a witness. That does not preclude him from participating as counsel.
MR. WHALEN: The Bar will object to that when we get to that.
MR. CALVO: The fact that Mr. Whalen, who has not previously indicated that --
THE COURT: That was my ruling. Let's go to something else.
You have to wait outside, sir.

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2. Footnote added by Petitioner. The question was addressed to Mr. Whalen, as evidenced by his immediate response thereto, not to the Petitioner, who obviously did not respond.

II. DR 1-102(A)(6)

Page/Lines

0010

Your Honor, that are many, many rules in that code that have to do with Mr. Calvo's role as an attorney, acts of fraud, acts of dishonesty, acts of misrepresentation, all of those things in his role as an attorney.

This particular rule contemplates other acts done by Mr. Calvo not in his role as an attorney. There is not in the pleadings, Judge, one iota of allegation at all as to any sort of act that Mr. Calvo did outside his role as an attorney, which would qualify under this particular rule.

If indeed the Bar at this point is not prepared to go forward with evidence of that character, it would appear to me and I would suggest to the Court that this ought to be dismissed because everything else they have becomes irrelevant and immaterial.

MR. WHALEN: Your Honor, I first of all object to him making a motion. Mr. Calvo, and I will locate it for you, has already made that motion to dismiss and the Court denied his

motion to dismiss. He also made that motion to the Supreme Court as part of his emergency stay and they didn't rule on it.

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This has been referred to this Court. You have already denied that motion.

THE COURT: Same ruling then.

MR. HOUSTON: Your Honor --

THE COURT: Only one at a time arguing, so let's set some ground rules.

One lawyer for each side can argue a point and examine a witness and things of that nature, so I don't want two joining in.

MR. HOUSTON: We understand.

THE COURT: So that motion will be denied.

Tell me what the other one is. You said two, everything was dropped except two. One is DL1-102 (a)(6) and the other is what number?

MR. WHALEN: 102(a)(1).

MR. HOUSTON: Just as a point of clarity, it was my understanding that the previous motion counsel has alluded to had not to do with the arguments that I just made but rather that Mr. Calvo's previous motion had to do with the fact that these rules were appealed in '87 and would no longer apply to now.

Is that the gist of the motion?

THE COURT: I had that in mind when I made

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the ruling. I had anticipated that could come up. I was thinking about that. My ruling would be the same.

Are you ready to proceed?

Excerpts from Petitioner's Appeal Brief

I. Changes in Standard of Proof

"The Referee denied Respondent's request for mandatory judicial notice based on Complainant's arguments and granted Complainant's motion for judicial notice over Respondent's objection that the differences in standard of proof in the cases which Complainant sought to introduce with the "clear and convincing" standard applicable to the pending proceeding made their introduction improper and prejudicial.[3]"

"*The Hearing*: Complainant introduced the following evidence at the final hearing: 1. The decision of Judge Peter Dorsey in the case of SEC v Warehouse, Inc., 689 F.Supp. 53 (D. Conn. 1988); and the decision of Judge Regensteiner in In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990), on both of which Complainant placed heavy evidentiary reliance, alleging that they should be treated as having met a standard of proof akin to "beyond a reasonable doubt."[4]"

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3. Especially in light of this Court's rejection of the Referee's decision on Complainant's Motion to Limit Issues at Trial.

4. FHT, Pages 15, 16 (see lines 17 to 19), 17. See response of Respondent at FHT, Page 22 (lines 11 et. seq.), 23 and 24.

"(3) Having totally been unable to demonstrate the existence of any scheme through his witnesses,[5] Complainant, despite this Court's ruling on the Referee's motion to limit issues at trial, used the factual findings of the injunction action as alleged proof of facts in the instant case, see FHT, Page 1021, 1022.[6]"

"Respondent was deprived of ability to properly present his case by the Referee's refusal to take mandatory judicial notice or permit introduction of the corroborating materials from the Gallagher series of cases, while permitting introduction for purposes of establishing facts of cases with lower standards of proof and which had, for purposes of this proceeding, been barred by this Court."

II. Deprivation of Right to Counsel

"*Exclusion of G. Richard Chamberlin*[7]: Respondent had been required because of financial constraints to represent

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5. Even Bremer having testified that no one intended to violate the law at closing and that Respondent felt everything was legal.

6. Clearly improper in light of the different standards of proof involved, see generally Lawton v State, 13 So.2d 211 (1943).

7. Final Hearing Transcript (hereinafter referred to as "FHT), Pages 3 to 8.

himself prior to the final hearing; however, he secured the agreement of his former Warehouse counsel to lead a team comprised of Mr. Chamberlin, Respondent and, for technical assistance, Larry D. Houston, a member of the law firm with which Respondent is employed, to defend him at the final hearing. Mr. Chamberlin was fully familiar with the case, having been involved in related proceedings for more than four years; however, Mr. Houston was almost totally unfamiliar with the details of the case.

When Respondent appeared with counsel at the final hearing, Complainant sought to disqualify both Mr. Chamberlin and Mr. Houston because, until that time, Respondent had represented himself. Failing in that argument, he objected to Mr. Chamberlin on the grounds that Respondent intended to call Mr. Chamberlin as a witness (he was to testify as to the finding by the United States Court of Appeals for the 11th Circuit in the Gallagher case that Respondent had issued no closing opinions). Respondent argued that Bar rules do not prohibit legal counsel for a party from giving testimony *if such restriction is unduly prejudicial to the client*, and that in the instant case, the exception should apply.[8] Respondent further indicated that Mr. Chamberlin was more important as an attorney than as a witness, and that, put to the choice, Respondent would not call Mr.

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8. See Rule 4-3.7(a)(4).

Chamberlin as a witness. At that point Complainant stated that he, without prior notice to the Referee, Respondent or Mr. Chamberlin, intended to call Mr. Chamberlin as a rebuttal witness and insisted that the rule be invoked prohibiting witnesses from hearing prior testimony.[9] The Referee acquiesced in Complainant's demands and Mr. Chamberlin was precluded from representing Respondent. Neither party thereafter called Mr. Chamberlin as a witness,[10] nor did Complainant attempt to talk to Mr. Chamberlin or secure his attendance by subpoena."

"Respondent was deprived of his ability to properly conduct his defense by the Referee's improper barring of his attorney, based on Complainant's false statement that Mr. Chamberlin would be called as a rebuttal witness."

"The Referee's evidentiary rulings, both prior to and at the hearing, his restrictions on Respondent's ability to undertake meaningful discovery, and his exclusion of Respondent's attorney from the hearing all violated

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9. Respondent had been precluded from calling attorneys for Complainant as witnesses, upon objection by Complainant. The Court is asked to note the provision of Section 90.616(c) of the Florida Rules of Evidence and note that Mr. Chamberlin was certainly "a person whose presence [was] ... essential to the presentation of a party's case."

10. Respondent declined to call him as a witness in order to preserve his rights on appeal.

Respondent's constitutional rights to due process, both on the state and federal levels.[11]

The government and every one of its branches, departments, agencies, and subdivisions are bound by the prohibition of due process guarantees which extend to legislative, judicial, executive and administrative proceedings. See State v Kelly, 112 S.E.2d 641, 644 (1960); West Virginia State Board of Education v Barnette, W.Va., 63 S.Ct. 1178, 319 U.S. 624, 87 L.Ed. 1628, (1943); Lovell v City of Griffin Ga., 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed.2d 949 (1938). The general meaning of due process has been applied to administrative agencies. See Mooney v Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935). Once a requirement of due process of law is deemed to apply, the question becomes what process is due, see Smith v Organization of Foster Families for Equality and Reform, 97 S.Ct. 2094, 431 U.S. 816, 53 L.Ed 2d 14 (1977). Due process is a flexible concept. See Matthews v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976) and it calls for such protection as a particular situation demands. The determination of what process is due in a particular situation requires a balancing or weighing of the individual or private and governmental interest in each particular situation, see Tler v Vickey, 517 F.2d 1089, *rehear-*

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11. See fifth, sixth and fourteenth amendments.

ing denied; Banks v Vickery, 521 F.2d 814, 815 (1975); and, Perry v Sell, 521 F.2d 815, *cert. denied* 96 S.Ct. 2660, 426 U.S. 940, 49 L.Ed.2d 393 (1976). A court should first identify and isolate competing interest and then weigh relative importance before reaching assessment, see Davis v United States 415 F.Supp 1086 (1976). The extent to which procedural due process must be afforded a person is implied by the extent to which a person may be condemned to suffer a grievous loss, see Johnson v Breliz D.C. 482 F.Supp. 125 (1979). Due process of law requires essential fairness and justice in proceedings. It is in procedural aspect, cost and guarantee of due process that assures to every person his or her day in court, see Truck v Carringon, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed 254 (1921).

The opportunity to be heard has been required to be adequate, fair, reasonable, meaningful in time and manner, see Parrot v Taylor, 101 S.Ct. 1908, 451 U.S. 527, 68 L.Ed.2d 420 (1981); Matthew v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976); Fuentos v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972). The hearing before a trier of fact is to be fair and impartial, see Schwaker v McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Failure of a tribunal to protect constitutional rights to confront or advise witnesses is a denial of due process, see Barber v Page, 88 S.Ct. 1318, 390 U.S.

719, 20 2d 255 (1968). Constitutional rights of confrontation and cross examination cannot be side-stepped because it happened to be convenient for one of the parties, see Holman v Washington, 364 F.2d 618 (1967). The exercise of a trial court's discretion must conform with due process, see United States v Grande 620 F.2d 1026 (1980).

The conduct of the Referee in depriving Respondent of meaningful discovery, in refusing to take mandatory judicial notice, in excluding Mr. Chamberlin and in depriving Respondent of an opportunity to present clearly relevant evidence impermissibly violated Respondent's right to effective legal counsel and to effective cross examination of the witnesses against him.[12] Indeed, it clearly demonstrated an impermissibly favorable predisposition towards Complainant. Those grounds in and of themselves justify reversal of the Referee's decision.[13]"

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12. Administrative convenience is not adequate support for infringement upon a Constitutional right, see Howell v Tobinen, 279 F.Supp 22; Shapiro v Thompson, 89 S.Ct. 1322, 394 U.S. 618 (19__).

13. The hearing before a trier of fact is to be fair and impartial, see Schwaker v. McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Due Process is the compendius expression for all those rights which the courts must enforce because they are basic to our free society, see Wolf v. People of State of Colorado, 69 S.Ct. 1359, 338 U.S. 25, 93 L.Ed 1782 (1949). It is an elementary precept in our form of law and government that a human being has an inherent right to due process of law, see Bund v. Wilson, 73 S.Ct. 1045, 346 U.S. 137, 97 L.Ed 1508. (1953). Due Process is interwoven throughout the common law, long prior to adoption of the Magna Carta, see Stoer v. Ok-

III. Adequate Notice

"There was any justification for the multi-year delay between the grievance committee decision and the initiation of this action, the failure to have the Complaint signed, or, the addition of a number of unauthorized charges to the Complaint.[14] (10) Complainant could not provide copies of materials pertaining to the initial years of its investigations to Respondent because they had "disappeared from the files."

" 2. VIOLATIONS OF RULE 3-7.4:[15] The constitutions of the United States[16] and the State of Florida

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lawaha River Farms Cp., 138 So. 270, (1931). Due Process is secured by the Magna Carta and successive constitutions of civilized states and nations, see Herman Doll V. Unemployment Compensation Comm., 82 A.2d 177, 182 7 NJ 547 (1951). In the United States, the concept of due process is embodied in the Fifth Amendment to the Constitution of the United States of America: "No person shall ... be deprived of life, liberty or property without due process of law."

14. That failure did not stop the Referee from finding Respondent at fault for such delays.

15. Florida Bar Rule 3-7.4(j): "If a grievance committee finds that there was probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal complaint .... The formal complaint shall be signed by the member of the committee who presided in the proceeding.

16. See fifth, sixth and fourteenth amendments.

provides specific constitutional guarantees that even the Florida Bar must respect. Among the most important is the right to due process. Complainant does not deny that it has failed to comply with the procedural requirements promulgated by the Supreme Court in conjunction with initiation of proceedings such as this one. Rather, it argues that such requirements are without substance.

Rule 3-7.4 specifically regulates grievance committee proceedings and must be complied with. It provides both timing requirements and other procedural requirements, none of which appear to have been complied with by Complainant, despite a preparation period of more than three years and, involvement by Mr. Whalen in the matter for more than three months prior to initiation. The deficiencies involved not only lack of timeliness, but total failure to comply with the requirement that the complaint be signed by the presiding member of the grievance committee [see Rule 3-7.4(j)].

With reference to timing deficiencies, Complainant cited to rule 3-7.11(a) and claimed that proper enforcement of such Rule requires separate contempt proceedings against the bar or against the Supreme Court. That argument appears ludicrous when one asks who would hold such proceedings, or seek to enforce them. Complainant ignored the observations of the Court in Florida Bar v Randolph, 238 So.2d 635 (1970), where addressing the issue of un-

warranted delays, the Court held that "while the time provisions of the predecessor to current rule 3-7.11(a) are directory rather than jurisdictional, still, responsibility for proceeding with diligence rests with the Bar. When it fails in the regard, the penalizing incidents which the attorney suffers from the unjust delay might well supplant more formal judgments as a form of discipline, even when the record shows that the attorney's conduct merits discipline. The current action could not more strongly reflect the Court's concerns and thus, Complainant's complaint should have been dismissed."

"The multi year delay in bringing this action led Respondent to leave a family business,[17] return to Florida and restart his life. A new disruption is neither called for nor proper."

IV. Evidentiary or Discovery Rulings

"3. Discovery[18]: During September of 1991, Respondent

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17. Respondent, prior to making such move and after completion of the SEC suspension, verified his good status with Complainant, see the certificate of good standing dated August 10, 1990, annexed as exhibit B to this Brief.

18. The Court is asked to note that the following matters involved clear violations by Complainant of Rule 4-3.4 of the Rules Regulating the Florida Bar.

served upon Complainant a request for production of documents and admissions. Because Respondent deemed Complainant's response inadequate, he filed a motion to compel production of documents and admissions on November 19, 1991. On December 25, 1991, Respondent served his first set of interrogatories on Complainant and filed a motion requesting permission to file more than 30 interrogatories and to require response at least 10 days prior to final hearing. On January 23, 1992, the Referee denied Respondent's motion to compel admissions and the next day Complainant moved for a protective order pertaining to the requested interrogatories, which the Referee granted, requiring a response to only five interrogatories.

4. Evidentiary Rulings

Judicial Notice: In contemplation of the final hearing, Respondent filed a Request for Mandatory Judicial Notice on August 31, 1992, principally of the court record of proceedings involving the underwriters in the Warehouse case in the United States Court of Appeal for the 11th Circuit, the United States Supreme Court and, in an action ancillary to the Warehouse injunctive action[19] in the United States District Court for the District of Connecticut, and on

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19. SEC v Electronics Warehouse, Inc., 689 F.Supp. 53 (D. Conn. 1988).

September 4, 1991, Complainant filed its own Motion Requesting Judicial Notice. The Referee denied Respondent's request for mandatory judicial notice based on Complainant's arguments and granted Complainant's motion for judicial notice over Respondent's objection that the differences in standard of proof in the cases which Complainant sought to introduce with the "clear and convincing" standard applicable to the pending proceeding made their introduction improper and prejudicial.[20]

Request for Permission to Introduce Excerpts from Prior Sworn Testimony of Non-Parties and of Taped Telephone Transcripts Provided by Complainant's Chief Witness to FBI: On September 12, 1992, Respondent requested permission to introduce excerpts from the sworn testimony of witnesses deposed by the SEC in the Warehouse investigation and case, as well as from telephone conversations taped by Complainant's chief witness, Edward Bremer, provided by him to the FBI and transcribed by the United States Justice Department. The Referee, at the request of Complainant, denied Respondent's request but indicated that he would accept complete copies of depositions and the complete Bremer Tapes, if they could be obtained by Complainant from the SEC.[21] At the final hearing, the Referee

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20. Especially in light of this Court's rejection of the Referee's decision on Complainant's Motion to Limit Issues at Trial.

permitted Respondent to read selected portions of the Bremer tapes into the record in conjunction with cross examination of Mr. Bremer, and to read into the record selected portions of the deposition of Bremer's attorney, Gary Granai. However, Complainant elicited the Referee's agreement that he would only provide such materials whatever weight the Referee found appropriate."

V. Federal Question

"C. Mr. Richmond's testimony indicated that: (1) Prior to the Warehouse closing, he had never met Respondent,[22] and that Respondent arrived after the closing had started, and there, for the first time, gave him and the bank the purported "disbursement letter." FHT, Page 440, 441, 442. (2) The escrow agent confirmed on the Friday prior to closing that it had been instructed by Messrs. Bremer and Gallagher to make a disbursement of approximately $325,000 to him directly and that the escrow agent agreed to do so three days prior to receipt of the "purported dis-

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21. Respondent had been unable to secure any cooperation from the SEC. Complainant obtained some, but not all, of the requested depositions, as a result of which Respondent was precluded from introducing significant evidence in his favor.

22. And that Bremer lied when he indicated that Mr. Richmond and Respondent met at a restaurant prior to the closing discussing mutual friends from Chicago.

bursement letter." FHT, Page 434. (3) He had met with the escrow agent's manager and staff prior to closing and completely disclosed to them the nature of his transaction [and therefore, by necessary inference, that there was no reliance on the "purported disbursement letter" as a condition to closing], FHT, Page 439-440. (4) He had spoken to Respondent during the afternoon of Friday, April 19, 1985, at the suggestion of Mr. Bremer, to verify that Mr. Richmond would receive his money upon breaking of escrow directly from the escrow agent, and that Respondent had agreed to provide the escrow agent with written instructions to that effect on behalf of Bremer and Gallagher, FHT, Page 435, 447. (5) The "purported disbursement letter" was, in fact, the letter Richmond had been promised, FHT, Page 447, 448. (6) Respondent played no role in finding him or in negotiation of the terms of his transaction, FHT, Page 431, 432, 433. (7) He had been sued in an ancillary action by the SEC seven years ago, through a trustee, to recover proceeds of the Warehouse offering but that he has not yet been required to make any restitution, and that he had no explanation for such lapse, FHT, Page 456, 457. (8) Respondent referred to the Richmond transaction as the purchase of an account receivable in a telephone call after the closing, during 1985, FHT, Page 445. (9) A broker by the name of Kolinosky was waiting at the closing for a large wire that would have been added

to the balance in the escrow account at closing, FHT, Page 453, 454.[23] (10) His whole transaction was with the banker and no one else, FHT, Page 458.[24]

D. Mr. Beasely's testimony indicated that:[25] (1) Only the registrant can amend the registration statement, FHT, Page 317.[26] (2) After he was replaced as underwriter's counsel, Respondent became special counsel to Warehouse, FHT, Page 317.[27] (3) The identity of underwriter's counsel was

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23. The Court is asked to note that, had that wire arrived, then the Bremer Advertising purchase would have been above the minimum offering, making all allegations as to its impropriety irrelevant.

24. See also page 448 where Mr. Richmond indicated that the decision to proceed to closing was made prior to Respondent's arrival.

25. The Court is asked to note that Complainant succeeded in convincing the Referee not to take judicial notice of the materials in recognized scholarly materials [Matthew Bender's SEC Series] which contradicted most of Mr. Beasely's testimony. See FHT Pages 363 to 366.

Mr.Beasely's testimony as to what the law was was not properly admitted since expert testimony is limited to factual and not legal issues, see Devin v City of Hollywood, 351 So.2d 1022 (1976).

26. The Court is asked to note that Mr. Beasely was technically incorrect as a matter of law since SEC Regulation C at Rule 478 specifies that any person signing a registration statement may amend or withdraw it. The Court is also asked to note that under no one's interpretation of the facts did Respondent meet the foregoing qualifications.

27. The Court is asked to note that the Referee reached the same finding of fact despite a total absence of evidence from Respondent, Bremer or anybody else to such effect, and in light of Bremer's earlier specific repudiation of such possibility, on cross examination, see FHT, Page 197.

material information that had to be disclosed to investors, FHT, Page 319.[28] (4) It was not unusual to have disbursements directly from escrow not disclosed in the registration statement and that the escrow agent would be advised as to such disbursements by a letter such as the "so called disbursement letter." FHT, Page 356.[29] (5) He attached no particular significance to the manner in which disbursement instructions were provided to the escrow agent, FHT, Page

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28. But, contrary to Mr. Beasely's statements, please see SEC Regulation C at Rule 436, in general, and subsection (e), specifically (which directly contradicts Mr. Beasely's testimony as to applicable law). See also SEC Release 33-6950 as it relates to consents [(10) *Consents -- (a) Experts:*], and, the definition of "counsel" in Item 228.509 of Regulation SB (the current successor to Regulation SK for small offerings). See SEC Rule 430A which permits a registration to be declared effective prior to determination of the identity of the membership of the underwriting syndicate.

In fact, the disclosure concerning the underwriting is contained in Item 508 of Regulation SK. That regulation provides no requirements at all concerning the identity of or changes in the identity of counsel to the underwriter. The situation of underwriter's counsel after declaration of effectiveness is most closely analogous to the situation of trial counsel after a trial decision, where the client, through another attorney, elects to appeal. There is absolutely no requirement for such counsel to file a motion for withdrawal as legal counsel with the court.

29. For an additional example of another such letter in the Warehouse offering, the Court is requested to review exhibit E(G)-1 to Respondent's written submission to the grievance committee, included in toto as Respondent's exhibit 8 at the final hearing.

Mr. Beasely's testimony on this point fatally flawed Complainant's argument concerning the nature and importance of the subject letter!

357. (6) The escrow agent failed to properly discharge its duties, FHT, Page 358. (7) Contrary to his initial testimony, neither the SEC nor, at the time of the Warehouse offering, the State of Florida, had authority to review registration statements as to the merits of the offering, FHT, Page 367, 368, 369, 370, 371. (8) Despite having agreed to testify at the hearing as an expert, he was not familiar with the SEC release dealing with the ethical obligations of attorneys when clients fail to make full disclosure, FHT, Page 371, 407, 408 (where the Referee, at the request of Complainant, refused to permit Respondent to question Complainant's expert as to the ABA and Association of the Bar of the City of New York's extensive studies and materials concerning the obligations of securities lawyers), 409, 410. (9) An an investor was free to borrow funds to purchase securities in a public offering as long as he does not borrow from the underwriter or the company, FHT, Page 376. (10) He could not, off the top of his head, cite to any rules or regulations supporting his opinions, FHT, Page 377. (11) He knew of no regulations that prohibited an affiliate of the company from purchasing stock in a public offering, FHT, Page 377 and 378. (12) Off the top of his head, he could not define an affiliate, FHT, Page 379.[30] (13) The concept of dilution

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30. The Court is asked to compare the definition suggested by Respondent with the definition thereof by the SEC in Rule 144. The court is asked to note that Mr. Beasely's differentiation of persons who might not be deemed affiliates does not conform to the SEC standards

was an important concept in securities law, FHT, Page 379, 380. (14) The purchase of securities in a public offering, at the public offering price, would have no affect on dilution, FHT, Page 380.[31] (15) After further cross examination, he was not sure whether or not the dilution table would have to be amended prior to closing to disclose purchases of securities by affiliates at the closing, FHT, Page 381. (16) All indictments, whether dropped, minor or dealing with matters having nothing to do with the offering, must be disclosed in a registration statement, or post effective amendments thereto, FHT, Page 382, 383, 384, 385.[32] (17) The qualifying language of Item 401 of Regulation SK had no meaning, FHT, Page 385.

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reflected in SEC Rule 144, the rule regulating sale of securities by affiliates.

31. But the Court is asked to note Item 506 of Regulation SK, which makes it clear that, if purchases by affiliates must be disclosed, then so must their affects on dilution. The Court is also asked to note the absurdity of Mr. Beasely's position as a practical matter. How can you disclose prior to closing something that you will not discover until the moment of closing!

32. The Court is asked to note that Item 401 of Regulation SK contained the following qualifying language "Describe any of the following events that occurred during the past five years and that are material to the evaluation and the ability and integrity of any director or executive officer of the registrant. And that with reference to such qualification, Mr. Beasely's expert opinion was that it had no meaning.

(18) On further cross examination, that if an indictment had been dropped, disclosure would have involved a judgment call, FHT, Page 385.[33]

(19) The escrow agent has total control over the escrow proceeds and neither the company nor the underwriter can have any input on its decisions, FHT, Page 387. (20) It is legally permissible for the duties of an underwriter's counsel to be divided between a number of law firms, FHT, Page 387. (21) Item 601(24) of Regulation SK required underwriter's counsel to file a consent to the use of its name in the registration statement, FHT, Pages 388, 389.[34] (22) If Respondent's firm had not filed a consent to the use of its name in the registration statement, that would be "another indicator that the prospectus ... is clearly false and misleading, FHT, Page 390, 391.[35] (23) A prospectus drafter's responsibility is limited to his knowledge after reasonable inquiry, at the time of drafting

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33. A crucial admission on the indictment issue.

34. However, his testimony is directly and unequivocably contradicted by SEC Regulation C, at Rule 436(e), which states that: "Where counsel is named as having acted for the underwriter or selling security holders, no consent will be required by reason of his having being named as having acted in such capacity. The Court is asked to note that the disclosure of underwriter's counsel "as having acted in such capacity" obviously contemplates action in the past tense, with no reference to any future activities.

35. However, see SEC Regulation C, at Rule 436(e) quoted above.

the prospectus, FHT, Page 392. (24) Securities laws do not require that a registration statement be prepared by an attorney, FHT, Page 393. (25) When an attorney is listed as "counsel"[36] that attorney is the guarantor of all the information in the subject registration statement as an expert, FHT, Page 393, 394.[37] (26) In his entire, multi-decade professional career, he had been involved in less than 5 best efforts offerings, FHT, Page 394. (27) In his entire,

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36. Which Mr. Beasely previously defined as including underwriter's counsel.

37. Mr. Beasely's position is clearly contrary to all law on such point. The Court is asked to note the following rules, regulations, and "real" authoritative sources: SEC Rule 436(e), Item 228.509 of new regulation SB; *Loss, Fundamentals of Securities Regulation; Little, Brown and Company, 1983*, pages 1034, 1035, 1234 through 1242, and 1256; *Sommner, 11 Part 1A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 7A-11 through 7A-14, 9-20 through 9-20.2, 9-21 through 9-23, 7A-116 through 7A-119; *Hazen, THE LAW OF SECURITIES REGULATION; West Publishing Co., 1985*, pages 214 through 217; and, *Sommner, 11 Part 2A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 4-343, 4-344, 4-231 through 4-234.11.

Mr. Beasely's "opinion" is clearly at variance with the SEC's pronouncement on point in In re Carter, CCH F. Sec, L. Rep., Paragraph 82,847 (1981 Transfer Binder 84,145-84,178) , which involved the following guideline. *"When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end his client's noncompliance."*

multi-decade professional career, he has represented an underwriter in one or two best efforts offerings, FHT, Page 394.[38] (28) 28. In his entire, multi-decade professional career, he has never been involved in a public offering involving less than $1,500,000, FHT, Page 394.[39] (29) The typical cost of a post effective amendment was about $1,000 per sentence, FHT, Page 395. (30) When an insider is involved in a transaction with the company involving even a few thousand dollars, a post effective amendment pertaining thereto must be filed, FHT, Page 397. (31) Contrary to the preceding answer, that if 43 separate transactions involving insiders occurred, it would be absurd to assume that you would have to file 43 different post effective amendments, FHT, Page 396, 397. (32) There are materially standards for all amendments to registration statements, FHT, Page 397. (33) Attorneys who file nothing and provide no opinions can still have federal securities laws liabilities, FHT, Page 398. (34) He had never heard of an instance when the SEC or anyone else brought a law suit against someone alleging that a prospec-

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38. It appears improbable that Florida Bar rules permit a person to characterize himself as an expert in matters that he has been involved in once or twice.

39. The Court is asked to note that Form S-1 is the form required by the SEC for larger offerings and that it appears that Mr. Beasely had no experience with Form S-18 or its requirements, the Form involved in the Warehouse offering and which had significantly lower disclosure obligations.

tus was not material because a change in the underwriter's legal counsel was not disclosed, FHT, Page 400. (35) There is no federal securities law requirement that underwriters be represented by legal counsel, FHT, Page 403. (36) In small offerings, the blue sky function is performed by counsel to the underwriter, FHT, Page 403, 404.[40] (37) The National Association of Securities Dealers, Inc. (the "NASD") would not normally deal with anyone other than underwriter's counsel, FHT, Page 404.[41] (38) First, that he had never heard of NASD rules regulating oversubscribed offerings, and almost immediately thereafter, that "sure he had heard of them" but had no idea what they dealt with, FHT, Page 404, 405. (39) He could not answer questions posed by Respondent of the top of his head, although he had had no such problem with questions posed by Complainant, FHT, Page 405. (40) If an affiliate bought one share or $10 worth of securities in a public offering, the closing could not take place until

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40. The Court is asked to note that the Wilkes-Beers firm prepared and filed all the Blue Sky Applications; please see the materials included as exhibits E(a), E(f) and E(l) to Respondent's written presentation to the grievance committee [which was filed as Respondent's exhibit 8 to the Final Hearing Transcript].

41. The Court is asked to note that the Wilkes-Beers firm prepared and filed all the NASD documents; please see the materials included as exhibits E(a), E(f) and E(l) to Respondent's written presentation to the grievance committee [which was filed as Respondent's exhibit 8 to the Final Hearing Transcript].

registration statement were amended to disclose the purchase (which had not taken place yet) because no materiality standards applied to affiliate purchases, they all had to be disclosed, FHT, Page 406.[42] (41) No firm he has ever been involved with would have ever been involved in an offering as small as the Warehouse offering, FHT, Page 407. (42) He was testifying as an expert as to why lawyers should never represent small companies or small underwriters, FHT, Page 407. (43) A wrong interpretation of a law ought not, in and of itself, to constitute a basis for securities and Bar sanctions, FHT, Page 408. (44) He evaded responding to questions dealing with the SEC's proposed guidelines for securities lawyers faced with non-complying clients, FHT, Page 409. (45)[43] Nothing the underwriter or company could have said would have justified release of the Warehouse offering proceeds by the escrow agent after April 7, 1985, FHT, Page 412. (46) There was nothing wrong with underwriter's counsel drafting amendments to registration statements but that they could not file them, that being reserved to the issuer, FHT, Page 418. (47) It is not improper for an attorney who rep-

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42. The Court is asked to note that although Form S-18 and Regulation SK require disclosure as to sale of securities by an affiliate, no item deals with purchases by affiliates in the offering. The Court is also asked to note that Mr. Beasely's answer contradicted his answer at FHT pages 377 and 378.

43. After significant attempts at hedging and avoiding the question.

resents a client on certain matters to respond to inquiries from such client concerning other matters, in which the client is represented by other legal counsel, FHT, Page 424. (48) Cold comfort letters are a method by which legal counsel verifies the accuracy of statements made concerning the company's financial [statements], FHT, Page 425."

"SUMMARY OF THE ARGUMENT

The Referee's decision is based on improperly introduced evidence and lacks factual and legal support sufficient to sustain his conclusions. It cannot be disputed that almost every procedural deficiency that can exist was present in Complainant's case. The Rule on which it based its case was repealed without re-enactment prior to commencement of its case.[44] The case was started more than two years after it should have been and the Complaint was not signed, as required, by the presiding officer of the grievance committee. Complainant was deprived of effective discovery by the Referee's improper protective order.[45] Respondent was deprived of ability to properly

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44. Complainant convinced the Referee that this Court's determination that the old rules would continue to apply to matters pending on the date of their repeal remedied that defect. However, Complainant's case was not pending on that date or for a long time thereafter.

45. Limiting discovery to 5 interrogatories, especially distressing in a case where all of the major witnesses are outside the jurisdiction or

present his case by the Referee's refusal to take mandatory judicial notice or permit introduction of the corroborating materials from the Gallagher series of cases, while permitting introduction for purposes of establishing facts of cases with lower standards of proof and which had, for purposes of this proceeding, been barred by this Court. Respondent was deprived of his ability to properly conduct his defense by the Referee's improper barring of his attorney, based on Complainant's false statement that Mr. Chamberlin would be called as a rebuttal witness. The Referee improperly permitted the testimony of Mr. Beasely, but thereafter improperly excluded Respondent's evidence of standards of conduct established concerning the issues in question by numerous other Bar organizations. Finally, following the final hearing, the Referee improperly communicated on an ex parte basis with Complainant, and Complainant, who somehow had many original portions of the record in its possession, failed to file them as part of the record.

ARGUMENT

SUBSTANTIVE MATTERS: This case presents a number of the major considerations facing securities lawyers during the first half of the 1980s, that being the conflict between their Bar related obligations and emerging positions by the

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governmental agencies that refused to co-operate with Respondent.

SEC. The issues have been clearly discussed by the American Bar Association and by the Association of the Bar of the City of New York, both organizations in which Respondent was a member. The most that ought to be argued, assuming that this Court is willing to emasculate the concepts of attorney client privilege, confidentiality and loyalty owed by attorneys to their clients is that Respondent honestly espoused one of two competing legal theories during 1985, and that his proved to be the weaker.

The attorneys in both In re Carter, CCH F. Sec, L. Rep., Paragraph 82,847 (1981 Transfer Binder, Pages 84,145-84,178),[46] and SEC v National Student Marketing Corp., 457 F. Supp. 682 (D.C. 1978), the two leading cases imposing obligations on attorneys in securities' law matters, were clearly found to have knowingly violated securities laws, they both clearly represented a party to such violations, and had represented such party extensively for a long period of time. In neither case were the subject attorneys subjected to sanctions of any kind. In the case of In re Keating Muething & Klekamp, CCH F. Sec. L. Rep. Paragraph 82,124 (1979 Transfer Binder at page 81,981,

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46. Respondent's conduct in Warehouse was similar to that of White & Case in In re Carter, *i.e.*, he informed counsel for Warehouse that he thought certain types of disclosure was required. It must be noted that no one at the Commission has ever considered the conduct of White & Case in In re Carter to have been improper.

81,995), where members of a law firm were found by the Commission to have participated in a continuing, multi-year series of materially inaccurate filings with the Commission, including filings reflecting forgiveness of over $1,000,000 in debt owed by a member of the Firm to the registrant, the Commission punished the errant group of attorneys by requiring them to improve their office procedures. All of the subject lawyers were found culpable in a manner significantly greater that Respondent was by Judge Dorsey. In none of such cases were the attorneys subjected to any disbarrment or suspension sanctions whatsoever.[47]

The Referee's decision is based principally on the decision of Judge Dorsey, improperly before the Referee and contradicted by the weight of the evidence presented; and, by the testimony of Complainant's expert, also improperly introduced but more importantly, specifically contradicted in all material respects by the rules promulgated by the SEC in Regulations C and SK. The great weight of the

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47. Respondent has been unable to find any reported litigated 2(e) proceedings where former counsel for an underwriter have been found responsible for filing registration statements, contrary to the wishes of the registrant. Respondent doubts that there are, or should be, any. This would be especially true in a situation such as this one, where Respondent has testified that he was only one of a series of law firms that represented the underwriter, and that his Firm's representation terminated before the offering began.

evidence, and all of the credible evidence disproves the allegations of Complainant.[48] Perhaps most damaging to Complainant's case were the admission by Bremer that at the time of closing all parties including Respondent believed that they were acting legally. Upon conclusion of Complainant's case, Respondent moved for dismissal, and that motion should have been granted.

The summary of testimony which constitutes the bulk of this brief, makes it clear that Complainant failed to prove its complaint in accordance with the applicable clear and convincing standard, if at all.[49] Except for its expert witness and his own improper testimony, Complainant's witnesses testified that Respondent not only thought that he was acting legally, but that he would not act improperly. Bremer's testimony in conflict with Respondent's was contradicted by Complainant's own witnesses,[50] by his own taped conversations, and by the sworn testimony of his own attorney to the SEC . Bremer's lack of credibility was

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48. Indeed, having introduced the Bremer testimony and then the contradictory testimony of Messrs. Richmond and Caruncho, Complainant clearly violated Rule 4-3.3(a) of the Rules Regulating the Florida Bar.

49. Indeed, the evidence, both qualitatively and quantitatively, overwhelmingly supported all of Respondent's assertions.

50. Caruncho as to the indictment and Richmond as to Respondent's participation at the closing.

cited in both the decisions improperly introduced by Complainant.[51]

Complainant's purported expert was not shown to have been designated or certified by the Florida Bar, could cite to only one section of one regulation in support of his conclusions, and as to that single section, specific SEC Rules proved him utterly wrong.[52] Indeed, the plain language of numerous SEC rules cited by Respondent but ignored by the Referee made it clear that Mr. Beasely was wrong in almost every part of his testimony. With little wonder. His expertise was limited to one or two representations of underwriters in offerings requiring different forms and applying different regulations. Unfortunately his extremely and demonstrably wrong testimony was both persuasive and very prejudicial."

"3. VIOLATIONS OF DUE PROCESS: The Referee's evidentiary rulings, both prior to and at the hearing, his restrictions on Respondent's ability to undertake meaningful discovery, and his exclusion of Respondent's attorney from

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51. Judge Regensteiner having specified that Bremer had deceived Respondent.

52. The Court is requested to note that Mr.Beasely's claimed status as an expert violated Rule 4-7.6 of the Rules Regulating the Florida Bar, and thus, his testimony should have been excluded.

the hearing all violated Respondent's constitutional rights to due process, both on the state and federal levels.[53]

The government and every one of its branches, departments, agencies, and subdivisions are bound by the prohibition of due process guarantees which extend to legislative, judicial, executive and administrative proceedings. See State v Kelly, 112 S.E.2d 641, 644 (1960); West Virginia State Board of Education v Barnette, W.Va., 63 S.Ct. 1178, 319 U.S. 624, 87 L.Ed. 1628, (1943); Lovell v City of Griffin Ga., 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed.2d 949 (1938). The general meaning of due process has been applied to administrative agencies. See Mooney v Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935). Once a requirement of due process of law is deemed to apply, the question becomes what process is due, see Smith v Organization of Foster Families for Equality and Reform, 97 S.Ct. 2094, 431 U.S. 816, 53 L.Ed 2d 14 (1977). Due process is a flexible concept. See Matthews v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976) and it calls for such protection as a particular situation demands. The determination of what process is due in a particular situation requires a balancing or weighing of the individual or private and governmental interest in each particular situation, see Tler v Vickey, 517 F.2d 1089, *rehear-*

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53. See fifth, sixth and fourteenth amendments.

ing denied; Banks v Vickery, 521 F.2d 814, 815 (1975); and, Perry v Sell, 521 F.2d 815, *cert. denied* 96 S.Ct. 2660, 426 U.S. 940, 49 L.Ed.2d 393 (1976). A court should first identify and isolate competing interest and then weigh relative importance before reaching assessment, see Davis v United States 415 F.Supp 1086 (1976). The extent to which procedural due process must be afforded a person is implied by the extent to which a person may be condemned to suffer a grievous loss, see Johnson v Breliz D.C. 482 F.Supp. 125 (1979). Due process of law requires essential fairness and justice in proceedings. It is in procedural aspect, cost and guarantee of due process that assures to every person his or her day in court, see Truck v Carringon, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed 254 (1921).

The opportunity to be heard has been required to be adequate, fair, reasonable, meaningful in time and manner, see Parrot v Taylor, 101 S.Ct. 1908, 451 U.S. 527, 68 L.Ed.2d 420 (1981); Matthew v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976); Fuentos v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972). The hearing before a trier of fact is to be fair and impartial, see Schwaker v McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Failure of a tribunal to protect constitutional rights to confront or advise witnesses is a denial of due process, see Barber v Page, 88 S.Ct. 1318, 390 U.S.

719, 20 2d 255 (1968). Constitutional rights of confrontation and cross examination cannot be side-stepped because it happened to be convenient for one of the parties, see Holman v Washington, 364 F.2d 618 (1967). The exercise of a trial court's discretion must conform with due process, see United States v Grande 620 F.2d 1026 (1980).

The conduct of the Referee in depriving Respondent of meaningful discovery, in refusing to take mandatory judicial notice, in excluding Mr. Chamberlin and in depriving Respondent of an opportunity to present clearly relevant evidence impermissibly violated Respondent's right to effective legal counsel and to effective cross examination of the witnesses against him.[54] Indeed, it clearly demonstrated an impermissibly favorable predisposition towards Complainant. Those grounds in and of themselves justify reversal of the Referee's decision.[55]

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54. Administrative convenience is not adequate support for infringement upon a Constitutional right, see Howell v Tobinen, 279 F.Supp 22; Shapiro v Thompson, 89 S.Ct. 1322, 394 U.S. 618 (19__).

55. The hearing before a trier of fact is to be fair and impartial, see Schwaker v. McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Due Process is the compendius expression for all those rights which the courts must enforce because they are basic to our free society, see Wolf v. People of State of Colorado, 69 S.Ct. 1359, 338 U.S. 25, 93 L.Ed 1782 (1949). It is an elementary precept in our form of law and government that a human being has an inherent right to due process of law, see Bund v. Wilson, 73 S.Ct. 1045, 346 U.S. 137, 97 L.Ed 1508. (1953). Due Process is interwoven throughout the common law, long prior to adoption of the Magna Carta, see Stoer v. Ok-

Excerpts from Petitioner's Appeal Reply Brief

I. Prejudice Based on National Origin

" While the evidence of wrongdoing by the escrow agent and the Wilkes-Beers Firm is unequivocable, the blame has been transferred to the Respondent as a scapegoat.[56]"

II. Federal Questions

"III. Participation by Mr. Beasely: The Complainant's argument starts by ignoring the fact that the Respondent objected to Mr. Beasley's testimony, and was promptly overruled. The stipulation referred to involved only Mr. Beasley's artfully prepared resume.

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lawaha River Farms Cp., 138 So. 270, (1931). Due Process is secured by the Magna Carta and successive constitutions of civilized states and nations, see Herman Doll V. Unemployment Compensation Comm., 82 A.2d 177, 182 7 NJ 547 (1951). In the United States, the concept of due process is embodied in the Fifth Amendment to the Constitution of the United States of America: "No person shall ... be deprived of life, liberty or property without due process of law."

56. The Referee's specific finding of fact that the Respondent was born in the Republic of Colombia is indicative of potentially improper bias. The Respondent doubts that any current court would find the fact that a person was black or a woman a relevant issue; however, the unfortunate association of Colombians with the illicit drug trade has made them ideal scapegoats.

This case did not involve scientific, technical or other specialized knowledge, it involved purported violations of Bar rules. The SEC has and exercises its own mechanisms to deal with violations of its rules, that being the 2(e) process. That rule has been recognized as in conflict with the obligations of attorneys under state bar ethical rules.[57] Mr. Beasley's testimony involved facts to which he was not privy, and law which he did not know. Unfortunately, his inaccurate testimony was "expertly and convincingly" presented in a manner which terminally tainted the subject proceeding.[58]

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57. See, *e.g.*, American Bar Association, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the SEC*, 35-2 *The Business Lawyer* 605 (1980); Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977); Block & Ferris, *SEC Rule 2(e) - A New Standard of Ethical Conduct or an Unauthorized Web of Ambiguity?* 11 Capital University Law Review 501 (1982); Downing & Miller, *The Distortion and Misuse of Rule 2(e)*, 54 Notre Dame Lawyer 774 (1979); Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *SEC Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 33-6344)*, 37 The Business Lawyer 915 (1982); *Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979)*, 35 The Business Lawyer 605 (1980).

58. His aircraft analogy missed one vital point, that being that the Complainant, by refusing to postpone a hearing, made it impossible for the Respondent to board the flight.

Not unsurprisingly, the Complainant fails to refute the Respondent's brief with reference to the numerous and material errors of law presented as facts by Mr. Beasely. That false testimony was the cornerstone for the Complainant case and as it crumbles, so should this action."

"VI. Referee's Findings Are Not Supported by Credible Evidence: As the Complainant stated, the Referee's findings of fact are presumed correct *unless clearly erroneous or lacking in support*.

The Referee found that the Respondent was special counsel to Warehouse, then counsel to the underwriter, and then special counsel to Warehouse, a proposition with no support on the record from anyone except the expert witness, who had no personal knowledge. The bulk of the Referee's findings were clearly predicated on the expert witness' statements to the effect that, as a matter of law, counsel for the underwriter was one of the persons described in Item 601(24) of regulation S-K, had to provide a written consent to the use of his name in the prospectus, and could be replaced as legal counsel only pursuant to a formal amendment to the prospectus. Indeed, when it was called to his attention that the Respondent had not filed such a consent, he indicated the Respondent was guilty of further violations. However, as the Respondent demonstrated by referencing the actual rules of the SEC,

the expert was totally wrong, as a matter of law! The issue is specifically dealt with by SEC Rule 436(e), which directly contradicted Mr. Beasley's statements."

Excerpts from Petitioner's Motion for Rehearing

I. Issues Involving Vagueness

"7. Former Disciplinary Rule DR1-102(A)(6) on which the Court bases its decision is unconstitutionally vague in violation of due process guarantees of both the Constitution of the State of Florida and the United States."[59]

"7. Unconstitutionality of DR1-102(A)(6)

The due process protections of both the Florida and United States Constitutions require that statutes or rules that govern conduct "be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties, and be couched in such terms that are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application.[60] Such statutes, in a legal setting,

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59. See amendments Five and Fourteen to the United States Constitution.

60. See **Baggett v Bullitt**, 377 U.S. 360 (1964); **Keyishian v Board of Regents**, 385 U.S. 589 (1967); **Watkins v United States**, 354 U.S. 178 (1957); **Lovell v City of Griffin**, 303 U.S. 444 (19__); **Thornhill V Alabama**, 310 U.S. 88 (1940); **Talley v California**, 362 U.S. 60 (1960); **Edwards v South Carolina**, 372 U.S. 229 (1963); **Cox v Louisiana**, 379 U.S. 536 (1965); and, **Brown v Louisiana**, 383 U.S. 131 (1966).

lend themselves "to selective enforcement against unpopular causes," see **NAACP v Button**, 371 U.S. 415 (1963).[61]

DR1-102(A)(6) provides as follows: "A lawyer shall not "[e]ngage in any other conduct that adversely reflects on his fitness to practice law." The phrase "any other" makes it clear that the proscribed conduct is something other than that defined in the other five subsections of DR1-102, but provides utterly no guidance as to what such conduct might be. Its catch all nature is sufficient to permit the Complainant to disbar any attorney it or its cronies find objectionable, on virtually any grounds they can imagine. It is therefore constitutionally deficient and the Complainant's prosecution of the Respondent thereunder may not be permitted. See **Webb v Department of Professional Regulation, Board of Professional Engineers**, 595 So.2d 1103 (5th DCA 1992); and, **Delk v Department of Professional Regulation**, 595 So.2d 966 (5th DCA 1992).[62]"

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61. See also **Southeast Aluminum Supply Corp. v Metropolitan Dade County**, 533 So.2d 777 (3rd DCA 1988).

62. See also **D'Alemberte v Anderson**, 349 So.2d 164 (1977); and, **State v Wershow**, 343 So.2d 605 (1977).

II. Ex Post Facto Aspects

"3. The Court determined that the expert witness' testimony introduced by the Complainant was proper and accurate concerning the Respondent's status as legal counsel to the "parties"[63] and as to the role of legal counsel as an "expert" in conjunction with liabilities and responsibilities for preparation and amendment of registration statements filed with the Securities and Exchange Commission under the Securities Act of 1933, as amended. In this regard, the Court must have rejected the materials from other jurisdictions introduced by the Respondent to prove the contrary point, as well as Securities and Exchange Commission rules 436(e)[64] and 478.[65] While Florida is free to create its own standards for the conduct of its attorneys, whether or not in agreement with the standards of the Securities and Ex-

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63. Despite the fact that Bremer has consistently admitted that the Respondent did not represent Warehouse, and that no testimony was introduced by either the underwriter or the Respondent admitting that at the times in question, the Respondent represented the underwriter. See excerpts from Bremer affidavits discussed *infra*.

64. Specifying that counsel to the underwriter was not included in the class of experts, and therefore not required to file a consent to the use of its name in a registration.

65. Specifying who could amend a registration statement, *i.e.*, only those who had signed it or filed consents to the use of their names therein. Copies of Securities and Exchange Commission Rules 436(e) and 478 are annexed hereto as composite exhibit 3.

change Commission, the federal courts or other states, the Complainant had itself indicated to the legal community in the State of Florida that in the preparation of registration statements, attorneys were not to be deemed experts,[66] thus the Complainant should be estopped from taking a contrary position in this action and the Court should reconsider its legal conclusion in this matter.[67]"

"3. The Role of Counsel in Securities Transactions

In addition to its attorney disciplinary role, the Complainant regulates the practice of law in the State of Florida by imposing educational standards and sponsoring seminars to meet such goals. At the very least, the Complainant must be held responsible for not misleading practitioners in such seminars so that in applying the laws as espoused, they

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66. See the lecture outline for the Complainant's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46. The Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not the lawyer was issuing written opinions to be shown to third parties, but that even in such cases, the attorneys' liability was not deemed to be as described by the Complainant's expert, whose testimony was totally at odds with that presented by the Complainant in this seminar and publication!

67. And if it determines that a change in standards is called for, apply it prospectively only.

become guilty of violating the rules governing the practice of law in the State of Florida.[68]

In this regard, the Court is asked to note that the testimony of the Complainant's expert on which it and the Referee materially relied is totally at odds with the position which the Complainant takes in conjunction with its role as educator of Florida attorneys. That is unequivocally demonstrated by the lecture outline for the Complainant's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46. The Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not the lawyer was issuing written opinions to be shown to third parties, but that even in such cases, the attorneys' liability was not deemed to be as described by the Complainant's expert, whose testimony was totally at odds with that presented by the Complainant in this seminar and publication!

If such materials do not reflect the actual state of the law in Florida, then the Complainant must be estopped

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68. To hold otherwise is akin to authorizing constitutionally impermissible entrapment.

from bringing this action after having been responsible for so thoroughly confusing the understanding of the actual law.

Based on the foregoing, the Court should reconsider its decision in this case."

III. Equal Protection, Costs

"2. The Court assessed all of the Complainant's costs against the Respondent, despite the fact that: (i) The Complainant's initial strategy of limiting issues at trial had been reversed by this Court the previous year; (ii) The Complainant had been forced to drop a majority of the counts in its complaint against the Respondent when it found that they had not, in fact, ever been authorized, and would have violated the Respondent's constitutional rights to due process; (iii) The testimony of Bremer at the Final Hearing was neither credible nor supportive of essential aspects of the Complainant's allegations, and, as in the case of Richmond, could have been presented without a personal appearance; and (iv) This Court's decisions on factual issues appear to be based almost exclusively on the final decisions in the prior injunctive action and 2(e) proceeding.

The factors established by this Court for assessment of costs in a case cited by the Complainant itself, **The**

Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978), lead to a determination that, even if the Complainant was successful in its case, each party should bear its own costs in this action. To decide otherwise violates the guarantees of equal protection contained in the Florida and United States Constitutions."

"2. The Issue of Costs

The Court should reconsider its assessment of costs, in light of its decision in **The Florida Bar v McCain**, 361 So.2d 700, 705 (Fla. 1978), cited by the Complainant. The action involved the disbarrment of a former justice of the Supreme Court of Florida for improprieties engaged in while on the bench. Addressing the issue of proper assessment of costs, the Court held that each party should bear its own costs where the Florida Bar takes an overbroad approach in the action which resulted in dismissal, voluntary or otherwise, of numerous counts included in the original complaint. In the instant case as in the McCain case, the Florida Bar took an overbroad approach, as a result of which, it had to voluntarily dismiss a majority of the counts with which it had charged the Respondent. Such overbreadth occasioned the Respondent significant costs of scarce funds and time, as did the Complainant's eventually unsuccessful argument concerning limiting issues at trial.

Based on the McCain decision, this Court should reverse the Referee's assessments of costs.

This Court may not differentiate in the application of its criteria for assessment of costs between minority attorneys and former Supreme Court members. To do so violates the Respondent's right to equal protection guaranteed by the Florida and United States Constitutions."

IV. Arbitrary, Cruel or Unusual Punishment

"8. The punishment imposed by the Court against the Respondent is, under the facts of this case, violative of the Respondent's rights under the Constitutions of the State of Florida[69] and the United States as impermissibly excessive and cruel.[70]"

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69. It violates both the excessive, cruel and unusual and the double jeopardy provisions of the Florida Constitution. Double jeopardy issues are material because, as the lost records of the Florida Bar would demonstrate, this action was initiated at the request of the Securities and Exchange Commission, and merely attempted to secure for the Securities and Exchange Commission what it failed to accomplish in its own 2(e) proceeding.

70. See amendments Five, Eight and Fourteen to the United States Constitution.

"8. Unconstitutionally Nature of Discipline Imposed

The eighth amendment to the Federal Constitution, as applied to the states by the 14th and fifth amendments, and Section Seventeen of Article One of the Florida Constitution, prohibit the imposition of unusual, cruel or inhuman punishment. Under the facts of this case, when considered with the intervening punishment to which the Respondent and his family have been subjected and the procedural irregularities associated with these proceedings, the disbarrment of the Respondent is an impermissibly cruel and unusual punishment. The proper tests for imposition of discipline were reflected in the case of **The Florida Bar v Neu**, 597 So.2d 266 (Fla. 1992), cited by the Complainant.

The case involved commingling of funds, and, the Florida Bar's appeal of decisions by the referee to the effect that the Florida Bar failed to prove, by clear and convincing evidence, that the attorney's conduct constituted dishonesty, misrepresentation, deceit or fraud. The case has no support for any of the Complainant's contentions; however, as in the case of most, if not all the cases cited by the Complainant, it does support the propositions which the Respondent has requested this Court to espouse, namely, that in order to prove a violation of DR 1-102(A)(6), the Complainant had to establish the element of intent by clear and convincing evidence, at the final hearing, and that dis-

cipline in this case would not serve the three purpose test referred to in that case.

At the final hearing, no evidence was introduced to indicate that the Respondent intended to deceive anyone; rather, Bremer, the Complainant's chief witness, testified that there was no intent by anyone to engage in unlawful activities with reference to the Warehouse closing, thus, the Referee's findings of fact concerning issues of the Respondent's purported dishonesty, fraud, deceit or misrepresentation were clearly erroneous and not supported by clear and convincing evidence.[71]

With reference to discipline, the Court held that it had to meet three tests:

First, the discipline has to be fair to society, both in terms of protecting the public from unethical conduct, *and, at the same time, not denying the public services of a qualified lawyer.* In that regard, the Respondent is subject to a standing injunction against violating securities laws and has served a two year suspension from practice before the Securities and Exchange Commission. That two year suspension, was, in fact, due to the nature of the

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71. The fact that the Respondent believed that the Bremer stock purchase, as described to him by Granai, was legal is buttressed by the Bremer affidavits discusses ***supra***.

Respondent's practice, served as a two year suspension in the practice of law, with all the financial and emotional hardships to him and his family that it entailed. Furthermore, the Respondent is, to the best of knowledge, the only spanish speaking or securities attorney in his geographic location. A great deal of his practice involving his hispanic clientele is either *pro bono*, or at greatly reduced rates, subsidized by his largely out of state corporate clientele. When the Florida Bar has been bemoaning the inadequate representation of minorities in the legal profession, it is difficult to justify its posture in the instant case. Indeed, references to the Respondent's Colombian heritage have not been placed in the record by the Complainant for his benefit, or for the benefit of this state's large hispanic population.

Second, the punishment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encouraging rehabilitation. Fairness is not served by multiple punishment for the same offense, especially in light of the Florida Bar's un-excused delays in bringing this action and its myriad procedural deficiencies in the conduct of this proceeding. Obviously, the discipline recommended has no thought for rehabilitation.

Third, the judgment should be severe enough to deter others. In point of fact, when considered with the results

of the injunction and 2(e) sanctions, no further discouragement is required.

If the Court elects to follow this case, it should reject both the Referee's findings of fact, as clearly erroneous and not supported by clear and convincing evidence in the record as to intent, and, reject the discipline imposed.

In addition, Article One, Section Nine of the Florida Constitution prohibits double jeopardy, at least as strongly as the United States Constitution, see **Wright v State**, 586 So.2d 1024 (1991). While normally double jeopardy does not apply to actions by different sovereigns, it would apply where the subsequent action was initiated at the instigation of the other jurisdiction. In the instant case, the missing Bar files would clearly establish that this proceeding was initiated at the request of the Securities and Exchange Commission, and that its goal was to accomplish what the Securities and Exchange Commission's own judge had declined to do, permanently bar the Respondent.

The Respondent has been twice tried and punished for the offenses again charged in this action. The results of the Court's current decision would be to put the Respondent thrice in jeopardy. Double jeopardy exists when the event involves a completely new beginning and the second preceding takes place before a new trier of fact, see **R.M. v**

State, 603 So.2d 64 (3rd DCA 1992); **Williams v State**, 601 So.2d 1253 (5th DCA 1992); and, **Polakoff v State**, 586 So.2d 385 (5th DCA 1991). Thus renewal of punishment for offenses already served is not appropriate."

V. Prejudice Based on National Origin

E. Improper Emotional Appeal to Ethnic Background

The Referee in this matter found it important to make a factual finding that the Respondent is Colombian. He did so because, throughout the Warehouse related proceedings, the Securities and Exchange Commission and the Complainant have made an issue of such fact. It is a shame that being Colombian is considered a negative factor in this country. That evaluation ignores the actual nature of the Colombian people. It is intolerable that the Florida Bar used such factor as an element in its case and this Court should not align itself with such blatant impropriety; especially when the Court's stated policy is that of encouraging an increase in the quantity, quality and role of minority attorneys in our legal system!"

VI. Federal Questions

"3. The Court determined that the expert witness' testimony introduced by the Complainant was proper and ac-

curate concerning the Respondent's status as legal counsel to the "parties"[72] and as to the role of legal counsel as an "expert" in conjunction with liabilities and responsibilities for preparation and amendment of registration statements filed with the Securities and Exchange Commission under the Securities Act of 1933, as amended. In this regard, the Court must have rejected the materials from other jurisdictions introduced by the Respondent to prove the contrary point, as well as Securities and Exchange Commission rules 436(e)[73] and 478.[74] While Florida is free to create its own standards for the conduct of its attorneys, whether or not in agreement with the standards of the Securities and Exchange Commission, the federal courts or other states, the Complainant had itself indicated to the legal community in the State of Florida that in the preparation of registration statements, attorneys were not to be deemed experts,[75] thus

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72. Despite the fact that Bremer has consistently admitted that the Respondent did not represent Warehouse, and that no testimony was introduced by either the underwriter or the Respondent admitting that at the times in question, the Respondent represented the underwriter. See excerpts from Bremer affidavits discussed *infra*.

73. Specifying that counsel to the underwriter was not included in the class of experts, and therefore not required to file a consent to the use of its name in a registration.

74. Specifying who could amend a registration statement, *i.e.*, only those who had signed it or filed consents to the use of their names therein. Copies of Securities and Exchange Commission Rules 436(e) and 478 are annexed hereto as composite exhibit 3.

the Complainant should be estopped from taking a contrary position in this action and the Court should reconsider its legal conclusion in this matter.[76]

4. The Court failed to consider the Respondent's claim that the proceeding violated the Respondent's due process rights under the Florida[77] and United States constitutions in conjunction with:

A. The limitation by the Referee of his rights to discovery, to mandatory judicial notice and to introduction of relevant evidence; and

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75. See the lecture outline for the Complainant's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46. The Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not the lawyer was issuing written opinions to be shown to third parties, but that even in such cases, the attorneys' liability was not deemed to be as described by the Complainant's expert, whose testimony was totally at odds with that presented by the Complainant in this seminar and publication!

76. And if it determines that a change in standards is called for, apply it prospectively only.

77. The guarantees provided in Section One, Article Sixteen, are available to Respondent's in Florida Bar disciplinary proceedings, see, *e.g.*, **Weathers v Davis**, 196 So. 487 (1940).

B. The unjustified delay by the Florida Bar in notifying the Respondent that it had reached a decision to bring this action and its attendant unjustified delay in bringing this action, especially in light of its intervening notification to the Respondent that he was in good standing with the Florida Bar."

"6. When compared with its decision in other cases, it appears that the Respondent and other minority attorneys are subjected to significantly greater penalties than other attorneys under comparable circumstances, in violation of the equal protection provisions of the Florida[78] and Federal Constitutions.

7. Former Disciplinary Rule DR1-102(A)(6) on which the Court bases its decision is unconstitutionally vague in violation of due process guarantees of both the Constitution of the State of Florida and the United States.[79]

8. The punishment imposed by the Court against the Respondent is, under the facts of this case, violative of the Respondent's rights under the Constitutions of the State of

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78. See Florida Constitution, Article One, Section Two.

79. See amendments Five and Fourteen to the United States Constitution.

Florida[80] and the United States as impermissibly excessive and cruel.[81]"

"4. Due Process Violations Involving Discovery, Mandatory Judicial Notice, Introduction of Relevant Evidence and Unjustified Prosecutorial Delays

The Complainant and this Court are bound by the applicable guarantees of due process and equal protection imposed by the Florida and Federal Constitutions.[82] In that regard, the Respondent was entitled, during the conduct of this proceeding, to a meaningful ability to defend himself. Because this Court is the final authority on the provisions of the Florida Constitution,[83] the Respondent's discussion

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80. It violates both the excessive, cruel and unusual and the double jeopardy provisions of the Florida Constitution. Double jeopardy issues are material because, as the lost records of the Florida Bar would demonstrate, this action was initiated at the request of the Securities and Exchange Commission, and merely attempted to secure for the Securities and Exchange Commission what it failed to accomplish in its own 2(e) proceeding.

81. See amendments Five, Eight and Fourteen to the United States Constitution.

82. Licenses essential in the pursuit of a livelihood may not be revoked or suspended without procedural due process, see **Robinson v Florida Board of Dentistry, Department of Professional Regulation, Division of Professions**, 447 So.2d 930 (3rd DCA 1984).

83. See the following cases where this Court found guarantees that should be applied to the instant case: The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978); Florida Bar v Randolph, 238 So.2d 635

will, instead, focus on the provisions of and interpretations of the Federal Constitution by which even this Court is bound.

The case of **Banks v Vickery**, 521 F.2d 814, 815 (1975), deals with constitutional challenges to the Georgia Bar exam by a class comprised of black applicants. While the plaintiff's did not succeed in their case, the court specifically found that states may not conserve or allocate a right to practice law;[84] and, that states cannot restrict practice of law in violation of rights to due process under federal and state constitutions.[85] In **Davis v United States** 415 F.Supp 1086 (1976), the court held that constitutional deficiencies in the administrative fact finding process "fatally infected" the integrity of the administrative findings.[86] In **Fuentes v Shevin**, 92 S.Ct. 1983, 407

(1970); Lawton v State, 13 So.2d 211 (1943); The Florida Bar v Price, 478 So.2d 812 (Fla. 1985); Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Simmons, 391 So.2d 684 (1980); The Florida Bar v Borja, 609 So.2d 21 (Fla. 1992); and, The Florida Bar v Agar, 394 So.2d 405 (1981).

84. By analogy, it may not deprive minorities of the right to practice law by prejudicial enforcement of ethical rules.

85. At 1103.

86. The case specifically deals with attorneys, at pages 1091, 1092!

U.S. 67, 32 L.Ed 2d 556 (1972), the court outlawed the replevin statutes of numerous states, including Florida. Its relevance in the instant case is its holding that the constitutional rights to due process require proper notice and a timely hearing. *In the instant case, the Respondent was not provided with notice of the filing of a complaint in 1987, the only notice being a 1988 notification that the matter was being referred to a grievance committee; the Respondent was not provided with notice of the decision of the grievance committee during the fall of 1989 until receipt of a complaint in this action during August of 1991. This despite the internal requirement elucidated by this Court in the Randolph Case, that disciplinary matters be resolved within six months after initiation of an investigation.* The Respondent was therefore provided with neither meaningful notice nor a timely hearing.

In **Holman v Washington**, 364 F.2d 618 (1967), the court dealt with the use of prior evidence without a proper foundation. The court held that such use was a deprivation of due process under the 5th and 14th amendments to the federal constitution, as well as under the applicable state constitution. It indicated that a predicate to use of such indirect evidence was that the prosecution have used diligent efforts to obtain the direct testimony of witnesses. *As applied in the instant case, such holding would prohibit the consideration of Bremer's testimony as to the statements*

made by Granai concerning the Respondent's statements as to Messrs. Jenkins, Baldrica and Scherer, and Bremer's statements concerning the calculations made in the Respondent's presence by Ms. Daniels, all of which have been subsequently denied in sworn affidavits.

In **Harrell v Tobriner**, 279 F.Supp 22 (USDC D.C., 1967), the Court made it clear that the practice of law is a right,[87] rather than a privilege and that states could not restrict constitutionally guaranteed rights for mere administrative convenience. The case of **Mooney v Holohan**, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935), involved a petition by an incarcerated person challenging the constitutionality of a conviction based on the use of perjured testimony by state officials. It goes well with the holdings in the following Florida state cases: Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Agar, 394 So.2d 405 (1981), cited by the Complainant! The Court determined that such conduct, if accurate, deprived the petitioner of his constitutional rights to due process.

The Complainant has asserted that the practice of law is a privilege and not a right. That attitude is reflected in

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87. That is clearly the case under Section One, Article Two of the Florida Constitution, see **State ex rel. Sbordy v Rowlett**, 190 So.2d 59 (1939).

the manner in which the Complainant conducted this proceeding. Clearly, under federal constitutional law, that is not the case and the Respondent was entitled not to a mere hearing, but to all of the rights constitutionally guaranteed in conjunction therewith. Such rights include the right to appropriate enforcement of discovery rights,[88] to timely notice of accusations against him, to a timely hearing of charges against him, to access to mandatory judicial notice as provided by statute, to introduction of relevant evidence on his behalf, and to exclusion of non-competent evidence (especially were competent evidence was readily available). Just as clearly, the Respondent was not provided a hearing that met such requirements.

The ability of a person to obtain a fair hearing is more difficult in an administrative setting, where the agency acts

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88. In addition to the formal restrictions imposed by the Referee on the conduct of discovery by the Respondent, he was deprived of access to most of his own records. He provided most of them to the Complainant during 1988 and such records were never returned. During 1990, in response to an inquiry from the Respondent, the Complainant notified him that he was in good standing, as a result of which, he resumed his Florida practice in January of 1991, leaving all remaining Warehouse materials in North Carolina, where they were eventually discarded. At the time this proceeding was initiated in August of 1991, he had virtually no Warehouse materials left, and neither the Securities and Exchange Commission, nor the Complainant were willing to assist in reconstructing such evidence. Most shockingly, at the final hearing, legal counsel to the Complainant admitted that several years worth of its files in this matter had disappeared.

as prosecutor, judge and appellate body. In such cases, the agency must carefully monitor its agents to assure that they fully give due respect to the appropriate constitutional guarantees. The judicial regulation of law in the State of Florida is currently under strong attack. A recent newspaper article reported the formation of a rival bar association because of perceived corruption and cronyism in the Florida Bar. Judiciary control of the legal profession is too important for this Court to permit its erosion by tolerating improper conduct by the employees of the Florida Bar."

"6. Equal Protection

The director of the Florida bar as well as the members of this Court have noted that minorities are disproportionately represented in the Florida Bar, especially in positions of leadership and responsibility. Records of the results of disciplinary proceedings maintained by the Florida Bar demonstrate that minority attorneys are also disproportionately subjected to disciplinary proceedings, and that the standards applied and discipline imposed appear to be different. An analysis of this decision and those of this Court in the Randolph and McCain Cases previously cited, as well as an analysis of the punishment in many of the cases cited by the Complainant and reviewed in this motion, makes it clear that such disparity is evident in the instant proceedings.[89]

7. Unconstitutionality of DR1-102(A)(6)

The due process protections of both the Florida and United States Constitutions require that statutes or rules that govern conduct "be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties, and be couched in such terms that are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application.[90] Such statutes, in a legal setting,

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89. See, *e.g.*, **The Florida Bar v Borja**, 609 So.2d 21 (Fla. 1992), one year suspension; **The Florida Bar v Moxley**, 462 So.2d 814 (Fla. 1985), 60 day suspension; **The Florida Bar v Simons,** 581 So.2d 154 (Fla. 1991), suspension for one year; **The Florida Bar v Adler**, 589 So.2d 899 (Fla. 1991); **The Florida Bar v Trinkle,** 580 So.2d 157 (Fla. 1991), public reprimand; **The Florida Bar v Diamond**, 548 So.2d 1107 (Fla. 1989), criminal conviction for mail and wire fraud; **The Florida Bar v Levine**, 571 So.2d 420 (Fla. 1990), criminal conviction for securities fraud, disbarrment related back to date of injunction, making defendant eligible for earlier re-admission; **The Florida Bar v Winderman,** 614 So.2d 484 (1993), suspension reduced; and, **The Florida Bar v Stalnaker,** 485 So.2d 815 (Fla. 1986), suspension. All of these cases were cited by the Complainant.

90. See **Baggett v Bullitt**, 377 U.S. 360 (1964); **Keyishian v Board of Regents**, 385 U.S. 589 (1967); **Watkins v United States**, 354 U.S. 178 (1957); **Lovell v City of Griffin**, 303 U.S. 444 (19__); **Thornhill V Alabama**, 310 U.S. 88 (1940); **Talley v California**, 362 U.S. 60 (1960); **Edwards v South Carolina**, 372 U.S. 229 (1963); **Cox v Louisiana**, 379 U.S. 536 (1965); and, **Brown v Louisiana**, 383 U.S. 131 (1966).

lend themselves "to selective enforcement against unpopular causes," see **NAACP v Button**, 371 U.S. 415 (1963).[91]

DR1-102(A)(6) provides as follows: "A lawyer shall not "[e]ngage in any other conduct that adversely reflects on his fitness to practice law." The phrase "any other" makes it clear that the proscribed conduct is something other than that defined in the other five subsections of DR1-102, but provides utterly no guidance as to what such conduct might be. Its catch all nature is sufficient to permit the Complainant to disbar any attorney it or its cronies find objectionable, on virtually any grounds they can imagine. It is therefore constitutionally deficient and the Complainant's prosecution of the Respondent thereunder may not be permitted. See **Webb v Department of Professional Regulation, Board of Professional Engineers**, 595 So.2d 1103 (5th DCA 1992); and, **Delk v Department of Professional Regulation**, 595 So.2d 966 (5th DCA 1992).[92]

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91. See also **Southeast Aluminum Supply Corp. v Metropolitan Dade County**, 533 So.2d 777 (3rd DCA 1988).

92. See also **D'Alemberte v Anderson**, 349 So.2d 164 (1977); and, **State v Wershow**, 343 So.2d 605 (1977).

8. Unconstitutionally Nature of Discipline Imposed

The eighth amendment to the Federal Constitution, as applied to the states by the 14th and fifth amendments, and Section Seventeen of Article One of the Florida Constitution, prohibit the imposition of unusual, cruel or inhuman punishment. Under the facts of this case, when considered with the intervening punishment to which the Respondent and his family have been subjected and the procedural irregularities associated with these proceedings, the disbarrment of the Respondent is an impermissibly cruel and unusual punishment. The proper tests for imposition of discipline were reflected in the case of **The Florida Bar v Neu**, 597 So.2d 266 (Fla. 1992), cited by the Complainant.

The case involved commingling of funds, and, the Florida Bar's appeal of decisions by the referee to the effect that the Florida Bar failed to prove, by clear and convincing evidence, that the attorney's conduct constituted dishonesty, misrepresentation, deceit or fraud. The case has no support for any of the Complainant's contentions; however, as in the case of most, if not all the cases cited by the Complainant, it does support the propositions which the Respondent has requested this Court to espouse, namely, that in order to prove a violation of DR 1-102(A)(6), the Complainant had to establish the element of intent by clear and convincing evidence, at the final hearing, and that dis-

cipline in this case would not serve the three purpose test referred to in that case.

At the final hearing, no evidence was introduced to indicate that the Respondent intended to deceive anyone; rather, Bremer, the Complainant's chief witness, testified that there was no intent by anyone to engage in unlawful activities with reference to the Warehouse closing, thus, the Referee's findings of fact concerning issues of the Respondent's purported dishonesty, fraud, deceit or misrepresentation were clearly erroneous and not supported by clear and convincing evidence.[93]

With reference to discipline, the Court held that it had to meet three tests:

First, the discipline has to be fair to society, both in terms of protecting the public from unethical conduct, *and, at the same time, not denying the public services of a qualified lawyer.* In that regard, the Respondent is subject to a standing injunction against violating securities laws and has served a two year suspension from practice before the Securities and Exchange Commission. That two year suspension, was, in fact, due to the nature of the

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93. The fact that the Respondent believed that the Bremer stock purchase, as described to him by Granai, was legal is buttressed by the Bremer affidavits discusses *supra*.

Respondent's practice, served as a two year suspension in the practice of law, with all the financial and emotional hardships to him and his family that it entailed. Furthermore, the Respondent is, to the best of knowledge, the only spanish speaking or securities attorney in his geographic location. A great deal of his practice involving his hispanic clientele is either *pro bono*, or at greatly reduced rates, subsidized by his largely out of state corporate clientele. When the Florida Bar has been bemoaning the inadequate representation of minorities in the legal profession, it is difficult to justify its posture in the instant case. Indeed, references to the Respondent's Colombian heritage have not been placed in the record by the Complainant for his benefit, or for the benefit of this state's large hispanic population.

Second, the punishment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encouraging rehabilitation. Fairness is not served by multiple punishment for the same offense, especially in light of the Florida Bar's un-excused delays in bringing this action and its myriad procedural deficiencies in the conduct of this proceeding. Obviously, the discipline recommended has no thought for rehabilitation.

Third, the judgment should be severe enough to deter others. In point of fact, when considered with the results

of the injunction and 2(e) sanctions, no further discouragement is required.

If the Court elects to follow this case, it should reject both the Referee's findings of fact, as clearly erroneous and not supported by clear and convincing evidence in the record as to intent, and, reject the discipline imposed.

In addition, Article One, Section Nine of the Florida Constitution prohibits double jeopardy, at least as strongly as the United States Constitution, see **Wright v State**, 586 So.2d 1024 (1991). While normally double jeopardy does not apply to actions by different sovereigns, it would apply where the subsequent action was initiated at the instigation of the other jurisdiction. In the instant case, the missing Bar files would clearly establish that this proceeding was initiated at the request of the Securities and Exchange Commission, and that its goal was to accomplish what the Securities and Exchange Commission's own judge had declined to do, permanently bar the Respondent.

The Respondent has been twice tried and punished for the offenses again charged in this action. The results of the Court's current decision would be to put the Respondent thrice in jeopardy. Double jeopardy exists when the event involves a completely new beginning and the second preceding takes place before a new trier of fact, see **R.M. v**

State, 603 So.2d 64 (3rd DCA 1992); **Williams v State**, 601 So.2d 1253 (5th DCA 1992); and, **Polakoff v State**, 586 So.2d 385 (5th DCA 1991). Thus renewal of punishment for offenses already served is not appropriate.

9. Discussions of Case Law Cited by the Complainant

In the Warehouse 2(e) proceeding, Judge Regensteiner found that the Enforcement Division of the Securities and Exchange Commission had appalled him by citation of cases for propositions which they did not support. The Respondent respectfully suggests that the same problem exists in this action, and that the Court should reconsider its decision in light of the real holdings. The Respondent will first deal with the federal cases and then with state cases.

A. Liability of Attorneys

The case of **Aaron v SEC**, 346 U.S. 680 (1980), determined that Section 17(a) of the Securities Act of 1934, as amended, requires a finding of scienter, except as to sellers under sections (a)(2) and (3), see Burger concurring opinion at (2), CCH page 97,685. **Pinter v Dahl**, 108 S. Ct. 2063 (1988), found attorneys performing mere legal functions were not "sellers." As a result of those two cases, many of the older cases cited by the Complainant were overruled or became inappropriate as precedent.

The case of **Capital Gaines Research Bureau, Inc.**, 375 U.S. 180 (1963), cited by the Complainant, involved interpretation of the provisions of the Investment Company Act, an act not involved in either the Warehouse cases nor this Florida Bar disciplinary proceeding. In addition, the Complainant's interpretation of this case was rejected, with reference to any applicability to actions under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, by the United States Supreme Court in **Aaron v SEC**, 346 U.S. 680 (1980), and in **Pinter v Dahl**, 108 S. Ct. 2063 (1988).

The case of **Ohio Drill & Tool Co. v Johnson**, 625 F.2d 738 (6th Cir. 1980), is not law in the 11th Circuit, of which the State of Florida is a part, having been decided 13 years ago (prior to both the Aaron and Pinter Cases) by the United States Court of Appeals for the Sixth Circuit. The only aspect of the case that has any bearing on the case at bar is that the Court found that directors who had diverted opportunities from their corporation had not acted with *actionable recklessness under Section 10(b) of the Securities Exchange Act of 1934, as amended, or Rule 10b-5 promulgated thereunder.*

The case of **SEC v Blavin**, 760 F.2d 706 (6th Cir.

1985), was cited by the Complainant in conjunction with the acceptability, for federal securities law purposes, of recklessness as a substitute for scienter. It must, in the case at bar, be construed taking into account the specific role of the Complainant itself in the factual setting, *i.e.*, that it refused to reschedule a hearing on the day of the Warehouse closing, making it physically impossible for the Respondent to engage in the careful and prudent verification activities which the Complainant and its purported expert found necessary to avoid recklessness. The Complainant must be estopped from claiming that the Respondent was required to spend time that it itself made impossible to spend. The Blavin case is not law in the 11th Circuit, of which the State of Florida is a part, having been decided 8 years ago (prior to the Pinter Case) by the United States Court of Appeals for the Sixth Circuit. It dealt with an unregistered investment advisor and thus, based on the Supreme Court's reasoning in the Pinter Case, has no relevance as to the conduct of an attorney. Furthermore, in light of the United States Supreme Court's subsequent finding that the Constitutional guarantee of freedom of the press apply to publications dealing with securities, the case appears to have been overruled.

B. Improper Mail Fraud Analogy

The case of **United States v Sanders**, 266 F.Supp. 615 (W.D. La. 1967), and the Complainant's argument buttressed thereby at page 37 of its brief, actually supports a finding by this Court that the Warehouse injunction and 2(e) decisions should have been dismissed, as to the Respondent. Because the facts at the hearing below reflect that the Respondent never used the mails with reference to any Warehouse related matters, then the following sentence by the Complainant: "*And the use of the mails in furtherance of such evil is incidental and a requirement for jurisdictional purposes ....*" totally defeats its case, and requires a finding that the Respondent has suffered improperly for more than eight years. The only two things which it has been demonstrated the Respondent did in the Warehouse affair was prepare a handwritten draft of suggested changes to a pending registration statement, hand delivered to Mr. Bremer, and, a disbursement instruction letter, hand delivered to participants at the Warehouse closing, after it had commenced.

C. Weight as Evidence of Prior Warehouse Cases

The case of **SEC v National Student Marketing Corp.**, 457 F.Supp. 53 (D.C. 1987), was cited by the

Complainant only to indicate that the Respondent had miscited it, while failing to explain how. The case, in fact, demonstrates that, contrary to the Complainant's allegation that a standard of proof at least as high as the clear and convincing standard was applicable in the Warehouse injunction case, such standard had been specifically rejected in the National Student Marketing Case as to injunction actions, see page 683 (headnote 3), page 701, "*In determining whether the Commission has shown a violation of the securities laws by the defendants, the Court will employ a preponderance of the evidence standard of proof*. Note 43 at page 701 makes it clear that such standard of proof was envisioned as applying in actions against lawyers.

The case of **SEC v Spectrum, Ltd.**, 489 F.2d 535 (2d Cir. 1973), involved reversal of a motion for summary judgment denying the Securities and Exchange Commission a requested injunction against an attorney. A decision reversing summary judgment is invalid as precedent for a proposition that the opposite result was warranted. As importantly the case is a 1973 case from the United States Court of Appeals for the Second Circuit. It was thus decided prior to the Supreme Court's decisions in the Pinter, Aaron and Hochfelder cases and is useless as precedent for the Complainant. *It does, however, indicate that in the Second Circuit, reviewing courts do not grant as much presumptive correctness to summary judgment factual*

determinations by trial courts as the Complainant asserts is the case in Florida. The Court held, at page 540 of its decision, that "[a]s in Dopp, *we need give no special deference to the district court's finding that there were no material issues of fact in dispute for 'we are in as good a position as [he] to read and interpret the pleadings, affidavits and depositions.'"* Contrary to the Complainant's assertion that the Warehouse injunction action should be given as great a deference as if it had been decided based on the "beyond a reasonable doubt" standard, this Court should grant it no deference at all! Especially since the Warehouse decision was, in fact, a decision by a district court subject to appeals to the Second Circuit, and thus, a decision governed by this case."

10. Miscellaneous Matters

A. Criminal Conduct

This Court has based its decision, in part, on a determination that the Respondent's otherwise applicable duty of confidentiality, was superseded because the conduct of the participants in the Warehouse matter was criminal, regardless of whether or not a criminal proceeding was ever initiated. In that regard the Court is respectfully requested to note that Bremer testified that at the closing, there was no intent by anyone to engage in any improper conduct, and

that intent is a critical element in the commission of a crime. Thus, not only has a criminal action never been initiated, but the Complainant's own witness in chief has testified in a manner making such a determination inappropriate. All other participants in the Warehouse closing who have been subject to Securities and Exchange Commission proceedings have vigorously denied any wrongful intent. There is utterly no evidence indicating that the Respondent was aware that anyone intended to engage in criminal conduct, and therefore, the Court's decision must be reconsidered.[94]"

"*E. Improper Emotional Appeal to Ethnic Background*

The Referee in this matter found it important to make a factual finding that the Respondent is Colombian. He did so because, throughout the Warehouse related proceedings, the Securities and Exchange Commission and the Complainant have made an issue of such fact. It is a shame that being Colombian is considered a negative factor in this country. That evaluation ignores the actual nature of the

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94. The Court has indicated that the Respondent was obligated to notify investors of a number of facts, however, it has ignored the fact that the Respondent could not, on his own, modify the Warehouse registration statement and that the Respondent had no way of knowing who the investors were. Furthermore, the timing involved and the overlapping hearing which the Complainant refused to reschedule made any such attempt impossible.

Colombian people. It is intolerable that the Florida Bar used such factor as an element in its case and this Court should not align itself with such blatant impropriety; especially when the Court's stated policy is that of encouraging an increase in the quantity, quality and role of minority attorneys in our legal system!factor in this country. That evaluation ignores the actual nature of the Colombian people. It is intolerable that the Florida Bar used such factor as an element in its case and this Court should not align itself with such blatant impropriety; especially when the Court's stated policy is that of encouraging an increase in the quantity, quality and role of minority attorneys in our legal system!"

Petitioner's Motion to Dismiss or for Summary Judgment

1. Original Motion

"**COMES NOW THE RESPONDENT**, William A. Calvo, III, *pro se*, and, pursuant to the provisions of Rules 1.420 and 1.510 of the Florida Rules of Civil Procedure, respectfully requests that the Referee dismiss the portions of the Complainant's complainant remaining after dismissal of the portions thereof subject to the Complainant's motion for Voluntary Partial Dismissal of Complaint. In support of his motion, the Respondent hereby incorporates by reference the arguments reflected in his initial and reply briefs to the Supreme Court appealing the referee's order limiting issues at trial, copies of which have been heretofore provided to the referee, and, in addition, states as follows:

1. On or about April 27, 1992, after the filing of the Respondent's reply brief with the Supreme Court in this matter, the Complainant filed a motion with the Referee for Voluntary Partial Dismissal of Complaint (the "Motion").

2. The Motion acknowledges that the Complainant's Answer Brief in this matter was materially inaccurate as to a material matter at issue.

3. The defect is fundamental to the Respondent's case and justifies a full dismissal of the Complainant's complaint in this matter.

4. Bar counsel has been forthright in admitting its error to the Referee; however, Bar counsel's error in this matter corresponds exactly with the allegations against the Respondent. Bar counsel claims that his material error was based on reliance on prior counsel and inadequate time to diligently review his files. The Respondent also inherited a project and did not have time to conduct a due diligence investigation into the facts that were misrepresented to him during the two business day period that took place in April of 1985. Unlike bar counsel, the Respondent had an extremely limited time frame in which to work which was beyond his control (rather than a self imposed deadline to file a complaint). It would be highly inappropriate to recognize factors mitigating bar counsel's failure to comply with the Florida Bar's Disciplinary Rules in this matter, without also recognizing that such factors applied to the Respondent.

5. Among the Respondent many affirmative defenses and mitigating factors reflected in his answer to the Complainant's Complaint, the Respondent stated as follows:

"**Twelfth**: *The Florida Bar Has not Brought This Proceeding in a Timely Manner*

1. The matters which are the subject of this proceeding occurred during the period commencing in the fall of 1984 and ending on April 22, 1985.

2. The Securities and Exchange Commission began its well publicized suit in this matter during April of 1986, and shortly thereafter, contacted the Florida Bar.

3. The injunction against the Respondent was entered in 1987.

4. The Securities and Exchange Commission's administrative proceeding was initiated in 1988 and the penalty imposed thereby was completed in 1990. The Florida Bar also conducted its investigation of this matter during 1988 - 1989, an investigation in which the Respondent fully cooperated.

5. As a result of the foregoing proceedings, the Respondent's reputation was badly and unfairly tarnished, his practice was destroyed and he was impoverished.

6. At the beginning of 1991, the Respondent again started his practice, after paying severe and undeserved penalties as a result of the Warehouse matter.

7. The Respondent has, in conjunction with the Warehouse matter, already been subjected to the following `punishment:'

   (a) He has settled an action with a trustee for Warehouse by paying $25,000 (where his firm, not the Respondent had received a fee of only $15,000);

   (b) He has been subjected to a permanent injunction, barring him from committing future mistakes involving securities laws; and

   (c) He has endured an administrative bar to practice or appearance before the Securities and Exchange Commission until July of 1990.

8. It is unconscionable to permit the Florida Bar to have delayed so long in bringing these proceedings, and to seek to cause further injury to the Respondent."

6. The Motion filed by Bar counsel admits that the Complainant has failed to comply with the procedural re-

quirements for bringing this action and thus establishes the Respondent's defense of laches reflected in the foregoing paragraph and supports a dismissal of this action.

7. The two remaining charges against the Respondent allege violations of repealed provisions of the Florida Bar's Rules. The charges pertaining to Rule 1-102(A)(1) prohibit violation of a disciplinary rule, however, all specifications pertaining to disciplinary rules other than to former DR 1-102(6) are being dismissed. DR Rule 1-102(A)(6) pertains to engaging in any other conduct that adversely reflects on fitness to practice law, a catch all provision that is not a part of the current Bar Rules and would be constitutionally deficient as the Complainant would seek to apply it in this matter.

8. Based on Bar counsel's admissions and the large quantity of mitigating factors in this case, the Complainant's complaint should be dismissed, as requested by the Respondent."

2. Reply Brief

"**COMES NOW THE RESPONDENT**, William A. Calvo, III, *pro se*, and replies to the Complainant's

Response to the Counter Motion to Dismiss Complaint or For Summary Judgment. For purposes of clarity, the Respondent will address the issues raised by the Complainant in the order presented:

1. The Complainant totally distorts the Respondent's argument. The Respondent has no objection to dismissal of the portions of the complaint requested by the Complainant, rather, he indicates that the Complainant's conduct in preparing and filing a materially false complaint has greatly prejudiced the defense of this matter and that the remaining allegations must be dismissed since the rules on which they are based have been repealed and, in the case of the only substantive rule, DR 1-102(A)(6), have not been re-enacted.

   Where a statute (or rule) is repealed without a re-enactment of the repealed law in substantially identical terms, the repealed provision is, as to its operative effect, considered as if it had never been enacted. Neither courts nor other adjudicatory officials have power to perpetuate a repealed rule or law.[95] Repeal of laws regulating conduct nullify all proceedings had under them.[96]

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95. See generally 73 Am. Jur. 2d, Statutes Section 384.

96. See generally Fla. Jur. 2d, Criminal Law, Sections 18 and 19.

Repeal of a statute or rule is presumed when the statute is the subject of a total legislative overhaul, see Flord v State, 129 So. 861 (Fla. 1930); Fort v Fort, 104 So.2d 69 (DCA 1, 1958). Repealing statutes should be given retrospective operation, see Yaffee v International Co., 80 So.2d 910 (Fla., 1955).

When the jurisdiction of a court depends on the jurisdiction of a statute that has been repealed, the jurisdiction falls even over pending cases, see State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959); Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla., 1964).

Clearly, the repeal without re-promulgation of DR 1-102(A)(6), requires that the Complainant's complaint now be dismissed.

2. Please see paragraph one above.

3. The Complainant's citation to rule 3-7.11(a) is somewhat confusing. The Respondent has been unable to find even one case where violations have resulted in a finding that either the Florida Bar, its employees or the Supreme Court are in contempt and it appears such a finding is outside the realm of reason with reference to

the Supreme Court. The citation is to the general rules of procedure and the interpretation thereof by the Complainant is not reasonable with reference to the allegations in the Respondent's motion. Rule 3-7.4 specifically regulates grievance committee proceedings and must be complied with. More specifically, the Complainant ignores the requirement that the complaint be signed by the presiding member of the grievance committee [see Rule 3-7.4(j)].

The Complainant's statement that the Respondent has failed to demonstrate how he has been prejudiced by the Complainant's delays cannot be made in good faith and perhaps the Respondent is wrong in believing that in the prosecution of this action, the Complainant is bound by the same rules that apply to the Respondent and all other attorneys practicing before the Courts of the State of Florida, including, without limitation, those reflected in the following Rules of Professional Conduct: Rule 4-3.3,[97] 4-3.4[98] and 4-3.8;[99] and, those reflected in the Rules of Appellate Procedure.

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97. Candor Toward Tribunal.

98. Fairness of Opposing Party and Counsel.

99. Special Responsibilities of a Prosecutor.

The Respondent incorporated the arguments in his appellate brief and appellate reply brief into his motion as support therefor. In his reply brief, the Respondent stated:

"The Complainant asserts that its delay in bringing this proceeding has not resulted in harm to the Respondent. That is not accurate. Had the Complainant acted in a timely manner, the Respondent might not have accepted the results of the administrative proceeding. He might not have moved back to Florida or resumed his practice of law.[100]

The Complainant did not comply with the requirements of of Florida Bar Rule 3-7.4(j).[101] The Respondent was not informed of the findings of the grievance committee[102] until August of 1991.[103] The Com-

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100. By moving back to Florida, the Respondent and his family trusted others to manage his wife's business in North Carolina, a business which as a result of mismanagement or dishonesty by the persons left in charge is now in bankruptcy.

101. Which provide that:

"If a grievance committee finds that there was probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal complaint .... The formal complaint shall be signed by the member of the committee who presided in the proceeding.

102. Whose deliberations were held during June of 1989.

plainant incredibly argues that such delays were of benefit to the Respondent.[104] That argument is utterly without merit and the injuries to the Respondent as a result of the Complainant's improper delays in violation of the doctrine of Laches and of the specific requirements of Florida Bar Rule 3-7.4(j) require that the Complainant's complaint be dismissed. If the Complainant's case should be dismissed, then the Referee's ruling is clearly in error."

In light of the foregoing, the Complainant's argument cannot be advanced in good faith.

The Complainant's arguments pertaining to the applicability of the doctrine of latches are also not persuasive, especially in light of the fact that the passage of seven years have included a repeal of the rules on which it seeks to rely. The fact is that:

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103. The Complainant's unsupported allegation that the Respondent knew of the grievance committee's decision in 1989 is untrue. He was made aware of such fact in conjunction with the Complainant's initiation of this proceeding.

104. That argument is analogous to an argument that it would be proper form and for the benefit of an innocent third party for the owner of a vehicle who knew that a person without authority to sell such vehicle was selling it to the innocent third party to wait until after such sale to inform the third party of the title deficiency.

(a) The failure of the Complainant to file a proper complaint in this action or to initiate this action on a timely basis has given rise to the situation complained of;

(b) The Complainant has had knowledge of the conduct complained of since late in 1985, and did not initiate this proceeding until 1991. It also had full knowledge of the intervening Securities and Exchange Commission proceeding and the consequences thereof;

(c) The Respondent had no knowledge that the Complainant would assert the causes of action on which this proceeding is based; and

(d) The Respondent will suffer prejudice if this proceeding is not barred (that being the only discernible goal of this proceeding).

The Complainant's assertion that valid and proper notice of the two year old alleged decision by the grievance committee was provided by delivery of the obviously defective complaint in this action is ludicrous, especially in light of the admissions in the Complainant's motion to dismiss.

4. The Complainant's argument that injection of mitigating factors in a motion for summary judgment is premature is without legal or logical support. If the Referee believes that the Complainant's conduct of this proceeding has been improper or reckless and that such conduct, as well as the intervening punishment resulting from the Securities and Exchange Commission's 2(e) proceeding justify a termination of this proceeding, he is utterly justified in dismissing this proceeding. If the Referee further reviews the mitigating factors cited by the Complainant, he will find that this is the unusual case where they all apply!

5. The Complainant's assertions pertaining to ex post facto laws is laudable. It is regrettable that the Complainant does not realize that its position with reference to Rule 3-4.6 which led to the Referee's order involved the identical issue. The Complainant has, however, ignored the corollary to the prohibition against enforcing ex post facto rules, that being the unenforcibility of repealed rules, as discussed in paragraph one."

Excerpts from Petitioner's Interrogatories)

"Respondent, William A. Calvo, III, *Pro Se*, hereby propounds the following interrogatories to the Complainant, pursuant to Rule 1.340 of the Florida Rules of Civil Procedure. In the event that, with reference to questions predicated on whether or not a certain statement was reflected in testimony of any person, the Complainant is of the opinion that it was not, please specify what such testimony was with reference thereto and on what specific testimonial instrument such conclusion is based, citing to the proper line and page.

1. Please indicate, based on all information currently in possession of the Florida Bar, what the testimony of Gary C. Granai, Esquire, was to the Securities and Exchange Commission during investigative stage testimony or depositions in the warehouse Case, concerning the following matters:

(a) The role of Robert Beers, Esquire, or his firm:

(1) As legal counsel to the underwriter in the Warehouse offering?

(2) In conjunction with preparation of the underwriting documents used during the Warehouse offering?

(b) The compensation paid by Warehouse or Granai to Mr. Beers or his firm or partners in conjunction with the warehouse offering?

(c) The role of Nina Gordon as an attorney in conjunction with the Warehouse offering?

(d) Any statements to the effect that Ms. Gordon "she was the SEC" in the Respondent's law firm and actually did the Warehouse prospectus work.

(e) Whether or not, to Granai's knowledge, the Respondent was notified when the Warehouse offering became effective.

(f) Whether or not there was significant communication with the Respondent during the Warehouse offering period.

(g) Whether or not Bremer claimed to have advanced funds to Warehouse prior to the closing.

(h) (1) Whether or not Bremer claimed to have been entitled to reimbursement for funds advanced to Warehouse from proceeds of the Warehouse offering.

(2) If so, whether or not the funds that Bremer claimed entitlement to reimbursement for were, according to Bremer, spent for items disclosed in the use of proceeds section of the Warehouse registration statement and the Respondent;

(3) Whether or not the respondent "put Bremer through the hoops" with questions designed to verify if the reimburseable expenses claimed by Bremer represented expenditures for items disclosed in the use of proceeds section of the Warehouse prospectus;

(4) Whether or not Granai claimed to have verified from personal observations that Bremer had advanced funds to Warehouse for expenditures disclosed in the use of proceeds section of the Warehouse registration statement.

(i) (1) Whether or not the Respondent advised Granai that certain kinds of transactions would not be proper

in conjunction with the Warehouse closing; and, if so

(2) Whether or not any transactions considered were not effected as a result of the Respondent's advice.

(j) Whether or not the Respondent's views concerning the legality of the purchase of stock by Bremer affiliates was predicated on facts presented by Granai or Bremer?

(k) Whether or not the Respondent's views concerning the legality of the purchase of stock by Bremer affiliates were held in good faith?

(l) Whether or not the difference between raising public funds to purchase goods or services, as opposed to paying debts associated with the purchase of identical goods or services, is a material difference requiring supplemental disclosure?

(m) Whether or not the Respondent was led to believe that the Warehouse offering was going to be closed at the maximum, rather than minimum offering amount?

(n) Whether or not Warehouse rejected as untimely a purported subscription for an additional $250,000 in

Warehouse stock from a broker by the name of Kalinowski, because the wire had not been received by the 2:00 p.m. closing deadline established by the Barnett Bank as the escrow agent?

(o) Whether or not the respondent's legal fee was $15,000 for services rendered to Warehouse, not the underwriter, in conjunction with preparation of changes reflected in post effective amendments to the Warehouse registration statement?

(p) Whether or not the Respondent understood his firm's legal fees were payable whether or not the offering successfully closed?

(q) Whether or not the Respondent, upon being informed of the Bremer indictment, advised that the Warehouse registration statement would have to be amended and that Bremer should resign from Warehouse?

(r) Whether or not the Respondent knew that the Warehouse offering was being continued after the Bremer indictment?

(s) Whether or not the Respondent was told immediately prior to the closing that the Bremer indictment had

either been dropped or was in the process of being dropped?

(t) Whether or not Granai had been unable to communicate with the United States attorney responsible for the Bremer indictment, despite efforts to do so because Mr. McDonald was not allowed to discuss the case.

(u) (1) Whether or not Granai ever indicated that the reason he did not specify that the Bremer indictment had been dropped in his closing opinion was because he had been replaced as criminal counsel to Bremer by a politically influential attorney; and if so,

(2) Whether or not Granai ever testify with reference to such issue that "I [Granai] can not have all the information. Bremer has other counsel."

2. Please indicate, based on all information currently in possession of the Florida Bar, what the Bremer Tape transcripts disclose concerning the following matters:

(a) Whether or not Gallagher & Company was represented by or relied on a number of law firms in the Warehouse offering, including an attorney in Denver

and Messrs. Beers and Wilkes of the Beers firm in New York?

(b) Whether or not Mr. Gallagher dealt with an attorney other than the Respondent in conjunction with questions as to the "minimum offering" and closing thereon?

(c) Whether or not Ms. Francesca Daniels, a financial consultant and friend of the Respondent, could have arranged to properly close the offering, had the participants elected to use her services?

(d) Whether or not Bremer deliberately deceived Gallagher with reference to the minimum offering by referring to faked conversations with the Securities and Exchange Commission?

(e) Whether or not Bremer plotted to close the offering notwithstanding any opinion that the Respondent might have with reference to the indictment of Bremer?

(f) Whether or not Bremer and Granai deliberately plotted to keep the Respondent ignorant of the proposed closing until the last minute, when the Respondent would be physically unable to discover adverse facts or prevent the closing?

(g) Whether or not all participants thought the final date for the closing was April 22, 1985?

(h) Whether or not Bremer plotted the fraudulent closing scenario without participation or knowledge by the Respondent, significantly prior to April 19, 1985?

(i) Whether or not Bremer ever appeared to lack respect for the truth?

(j) Whether or not Bremer plotted with Granai to assure that Gallagher would not find out about the illegal loans?

(k) Whether or not Bremer claimed to have put a lot of money into Warehouse?

(l) Whether or not Bremer discussed the delay in closing directly with members of the Securities and Exchange Commission's Boston regional Office prior to the closing?

(m) Whether or not Bremer and Granai failed to keep commitments to provide verifying information made to Gallagher and the Respondent prior to the closing?

(n) Whether or not Bremer told anyone that:

(1) He had been entitled to reimbursement for advances to Warehouse directly from closing proceeds, and, if so, whether or not

(2) He had factored such receivable and arranged for an affiliate to invest in Warehouse with the proceeds?

(o) Whether or not upon discovery that there had been a problem with the Warehouse closing, the Respondent's requested that trading in Warehouse be stopped?

(p) Whether or not Bremer lied to the Respondent concerning the basis for the Securities and Exchange Commission's investigation of the Warehouse closing?

(q) Whether or not Bremer claimed to anyone that he was innocent of the charges reflected in the indictment that was a subject of the complaint against the Respondent?

(r) Whether or not the Respondent believed everything involving the Warehouse offering was proper during the unscheduled meeting in the respondent's office on April 19, 1985?

(s) Whether or not the sums paid to Bremer's order (*i.e.*, to Richmond) from the offering proceeds) were paid as reimbursements for advances used for expenses disclosed in the registration statement as payable from proceeds of the offering?

3. Please indicate, based on all information currently in possession of the Florida Bar, what Edward Thomas Kalinowski, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Bremer was looking for personal loans using the claim of entitlement to proceeds from the Warehouse closing for prepaid advertising advances significantly prior to April 19, 1985.

(b) Whether or not Mr. Granai had opined that such loans were legal.

(c) Whether or not it appeared that everyone involved believed that April 22, 1985 was the proper closing deadline.

4. Please indicate, based on all information currently in possession of the Florida Bar, what Marvin Richmond, in his testimony and depositions for the Securities and Ex-

change Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not he verified that he would be repaid for his loan to Bremer directly from the escrow proceeds at the closing, in a call to the Barnett Bank, as the escrow agent, prior to requesting verification from the Respondent?

(b) Whether or not the Respondent's Disbursement Instructions Letter to Barnett Bank, as the escrow agent, arrived at the offices of Barnett Bank after the escrow agent had made arrangements for the closing, in the afternoon of April 22, 1985?

(c) (1) Whether or not Mr. Richmond discussed the nature of his loan to Bremer with Barnett Bank's representative in charge of the Warehouse closing, prior to the closing, and if so

(2) Whether or not Mr. Richmond disclosed his profit on the transaction?

(d) Whether or not the Respondent ever discussed with Mr. Richmond that he had been led to believe that Messrs. Richmond and Bremer were long time acquaintances.

(e) Whether or not the Respondent played any role in arranging the Richmond transaction, other than confirming the contents of the Disbursement Instructions Letter to Richmond in a telephone conversation.

(f) Whether or not The Respondent ever indicated to Mr. Richmond that he believed the Richmond loan involved the factoring of a Bremer receivable.

(g) Whether or not Mr. Kalinowski vehemently claimed to be awaiting a $250,000 wire for deposit into the escrow account at the closing, and was extremely upset when the closing was not extended in order to accommodate his clients' subscriptions.

(h) Whether or not Barnett Bank's representative was responsible for the closing.

(i) Whether or not the Respondent arrived at Barnett Bank's offices after the participants had broken for lunch.

5. Please indicate, based on all information currently in possession of the Florida Bar, what Raymond Crane, in his testimony and depositions for the Securities and Exchange

Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Bremer ever indicated to him that the Warehouse offering was going to be oversubscribed, rather than merely closing at the minimum offering.

(b) Whether or not Bremer was soliciting personal loans at least three weeks prior to the closing, claiming that the transactions were totally legal.

(c) Whether or not Barnett Bank was responsible for the closing.

(d) Whether or not Bremer paid Crane, out of everyone's view.

(e) Whether or not Bremer lied to Crane concerning the reason for the Securities and Exchange Commission's investigation of Warehouse, claiming that it was caused by Gallagher's refusal to sell the stock purchased by Bremer's affiliate at the closing.

(f) Whether or not the closing had been scheduled for April 19, 1985, but was postponed until April 22, 1985.

6. Please indicate, based on all information currently in possession of the Florida Bar, what Donald Ehrlich, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Bremer lied concerning the nature of the Securities and Exchange Commission's investigation into the Warehouse matter.

(b) Whether or not Richmond believed that the loan to Bremer was legal.

(c) Whether or not Bremer intended to violate securities laws by paying compensation not disclosed in the Warehouse registration statement, withholding such information from his attorneys.

(d) Whether or not Bremer claimed to have exhausted his personal funds in making advances to Warehouse.

(e) Whether or not immediately prior to the closing, Gallagher believed that the minimum offering had been subscribed to.

(f) Whether or not Bremer claimed that the minimum offering had been subscribed to during the week prior to the Warehouse closing.

(g) (1) Whether or not he was present during an informal social gathering at a Fort Lauderdale waterfront restaurant (Shooters) at which the Warehouse party and the Respondent met, and if so

(2) Whether or not there was any discussions of loans or closing gimmicks.

(h) Whether or not Messrs. Bremer or Granai claimed that they, rather than Gallagher, had been responsible for the success of the Warehouse closing.

7. Please indicate, based on all information currently in possession of the Florida Bar, what Dean Scholl, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Granai was a securities and investments attorney.

(b) Whether or not Granai's background as an Annapolis graduate and naval officer lent him a presumption of credibility.

(c) Whether or not he ever had discussions concerning Warehouse with the Respondent.

(d) Whether or not the structure of his proposed involvement with Warehouse was changed, on or about April 10, 1985, when it was determined that a subscription and guaranteed buy back would not be legal.

(e) (1) Whether or not Granai described that a loan transaction to Bremer, repaid from proceeds legally obtained by Bremer at closing would have been legal, and if so

(2) Whether or not that concept was developed by Granai, Bremer and him, during a meeting on or about April 10, 1985.

(f) Whether or not he relied on Barnett Bank's involvement in the offering in making his investment decision.

(g) Whether or not Scholl ever disclosed his role as a lender in the Warehouse offering to the Respondent.

8. Please indicate, based on all information currently in possession of the Florida Bar, what John J. Stewart, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Bremer lied to him concerning the nature of the Securities and Exchange Commission's investigation of Warehouse.

(b) Whether or not Bremer was looking for bridge loans for Warehouse during March of 1985.

(c) Whether or not Bremer claimed that Warehouse had incurred significant expenses during the offering for advertising, mail order catalogues and in connection with a Radio Shack contract.

(d) Whether or not Bremer claimed to have receivables from the Warehouse closing with which he could collateralize loans.

(e) Whether or not a major element giving the proposed loan transaction credibility was the participation of Barnett Bank as the escrow agent.

9. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the Securities and Exchange Commission's administrative law judge in the Respondent's 2(e) proceeding found that:

(a) The Respondent had been deceived by Messrs. Bremer and Granai.

(b) The Respondent's demeanor, the testimony of his witnesses and the suffering occasioned to him and his family as a result of the Warehouse matter mitigated against a permanent bar preventing the petitioner from practicing before the Securities and Exchange Commission.

(c) The conduct of the Securities and Exchange Commission's staff in the 2(e) proceeding was appalling in that they deliberately distorted materials presented to the judge in support of their case.

(d) He was not free to consider the underlying facts, as a result of Securities and Exchange Commission rules.

9. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the Respondent has fully complied with the penalties imposed by the

Securities and Exchange Commission's administrative law judge in the 2(e) proceeding.

10. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the decision in the Securities and Exchange Commission's 2(e) proceeding was based on the findings of fact of the District Court in the Warehouse case.

11. Please indicate, based on all information currently in possession of the Florida Bar, the decision of the District Court in the Warehouse case was purportedly based exclusively on the Respondents admissions. If not, please indicate on what testimony other than admissions by the respondent the decision was based.

12. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the admissions on which the District Court based its decision against the petitioner in the Warehouse matter are governed by Rule 36 of the Federal Rules of Civil Procedure.

13. Please indicate, based on all information currently in possession of the Florida Bar, whether or not, by its terms, Rule 36 of the Federal Rules of Civil Procedure specifically provides that admissions made thereafter are effective only for such case, and cannot be used for any other purpose.

14. Please indicate, based on all information currently in possession of the Florida Bar, whether or not, if the decision of the Securities and Exchange Commission's administrative law judge was based on a decision exclusively relying on admissions provided under Rule 36 of the Federal Rules of Civil Procedure, such decision was improper.

15. Please indicate, based on all information currently in possession of the Florida Bar, whether or not there is any evidence of any wrongdoing or improper behavior by the Respondent since resumption of his practice upon termination of his bar against practice before the Securities and Exchange Commission.

16. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the Securities and Exchange Commission is barred from regulating the practice of law by the Administrative Procedures Act.

17. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the Securities and Exchange Commission claims or has ever claimed that proceedings under Rule 2(e) are legal because they do not involve regulation of the legal profession but rather, merely

regulate the Securities and Exchange Commission's internal procedures of practice."

Excerpts from Petitioner's Request for Production of Documents & Request for Admissions

"Pursuant to the provisions of Rules 1.280, 1.350 and 1.370 of the Florida Rules of Civil Procedure, the Respondent hereby demands that the Complainant:

(a) Produce the following described documents, at the Respondent's offices located at 11203 Southeast 53rd Court, Belleview, Florida 32620, on the 8th day of October, 1991, at 5:00 p.m., or mail photocopies thereof certified as accurate to the Petitioner's mailing address, 4488 Southwest 44th Court; Ocala, Florida 32674 by such date and time:

1. Copies of all transcripts of investigatory testimony taken by the Securities and Exchange Commission in the Electronics Warehouse case, including, without limitation, the testimony of: Gary Granai; Marvin Richmond; Edward Thomas Kalinowski; Raymond Crane; Donald Ehrlich; Dean Scholl; John J. Stewart; William A. Calvo, III; and, Michael F. Gilligan.

2. Copies of all transcripts of depositions taken by the Securities and Exchange Commission in the Electronics Warehouse case, including, without

limitation, the depositions of: Gary Granai; Marvin Richmond; Edward Thomas Kalinowski; Raymond Crane; Donald Ehrlich; Dean Scholl; John J. Stewart; William A. Calvo, III; and, Michael F. Gilligan.

3. Copies of all transcripts of telephone conversations taped by Edward Bremer and provided to the United states Justice Department, Securities and Exchange Commission or Florida Bar.

4. Copies of all affidavits, notes, correspondence, or other tangible materials collected by the United States Justice Department, Securities and Exchange Commission or Florida Bar in conjunction with investigation of the Warehouse matter or preparation or prosecution of all Warehouse related cases.

5. Copies of all materials provided by the Respondent to the Florida Bar or grievance committees thereof in conjunction with this proceeding and the preliminary investigations thereof.

6. Copies of all testimonial transcripts involving proceedings related to this proceeding with which the Florida Bar has been involved.

7. Copies of all notes, memoranda or other materials prepared or reviewed by the Florida Bar's grievance committee which recommended this proceeding.

8. Copies of all notes, memoranda or other materials in the possession or control of the Florida Bar concerning the access availed of to materials provided by the Respondent to the grievance committee which recommended this proceeding, by members thereof.

9. Copies of the transcripts of the Securities and Exchange Commission's 2(e) proceedings against the Respondent, including the exhibits introduced thereat.

10. A copy of the decision by the Securities and Exchange Commission's administrative law judge in the 2(e) Proceeding against the Respondent, including all footnotes thereto.

11. Copies of all other materials which the Complainant intends to use, directly or indirectly, in conjunction with prosecution of this proceeding.

(b) That the Complainant admit the genuiness of all the documents reflected in paragraph (a) above and the admissibility in this proceedings of any excerpts therefrom selected by the Respondent.

(c) That the Complainant admit the accuracy of the following statements, and their admissibility in this proceeding:

1. That Gary C. Granai, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

   (a) Robert Beers, Esquire, and his firm served as legal counsel to the underwriter in the Warehouse offering, prepared the underwriting documents used and billed $19,000 for their services.

   (b) Nina Gordon was the attorney in the Respondent's law firm principally involved with the Warehouse offering and that she was :the SEC" in the Respondent's law firm and actually did the prospectus work.

   (c) The Respondent was not notified when the Warehouse offering became effective.

(d) There was little communication with the Respondent during the Warehouse offering.

(e) Bremer claimed to have advanced funds to Warehouse.

(f) Bremer claimed to be entitled to reimbursement for funds advanced to Warehouse from proceeds of the Warehouse offering.

(g) The funds that Bremer claimed entitlement to reimbursement for were, according to Bremer, spent for items disclosed in the use of proceeds section of the Warehouse registration statement and the Respondent "put Bremer through the hoops" with questions designed to verify such fact.

(h) Granai verified from personal observations that Bremer had advanced to Warehouse for expenditures disclosed in the use of proceeds section of the Warehouse registration statement.

(i) The Respondent advised Granai that certain kinds of transactions would not be proper in

conjunction with the Warehouse closing, as a result of which they were not effected.

(j) The Respondent's views concerning the legality of the purchase of stock by Bremer affiliates were predicated on facts presented by Granai and Bremer.

(k) The Respondent's views concerning the legality of the purchase of stock by Bremer affiliates were held in good faith.

(l) The difference between raising public funds to purchase goods or services, as opposed to paying debts associated with the purchase of identical goods or services is not a material difference requiring supplemental disclosure.

(m) The Respondent was led to believe that the Warehouse offering was being closed at the maximum, rather than minimum offering amount.

(n) Warehouse rejected as untimely a purported subscription for an additional $250,000 in Warehouse stock from a broker by the name of Kalinowski, because the wire had not been

received by the 2:00 p.m. closing deadline established by the Barnett Bank as the escrow agent.

(o) The Respondent's legal fee was $15,000 for services rendered to Warehouse, not the underwriter, in conjunction with preparation of changes reflected in post effective amendments to the Warehouse registration statement.

(p) The Respondent understood his firm's legal fees were payable whether or not the offering successfully closed.

(q) The Respondent, upon being informed of the Bremer indictment, advised that the Warehouse registration statement would have to be amended and that Bremer should resign from Warehouse.

(r) The Respondent did not know that the Warehouse offering was being continued after the Bremer indictment.

(s) The Respondent was told immediately prior to the closing that the Bremer indictment had

either been dropped or was in the process of being dropped.

(t) Granai had been unable to communicate with the United States attorney responsible for the Bremer indictment, despite efforts to do so because Mr. McDonald was not allowed to discuss the case.

(u) The reason Granai did not specify that the Bremer indictment had been dropped in his closing opinion and merely opined that a government victory in the case was unlikely was because he had been replaced as criminal counsel to Bremer by a politically influential attorney, stating "I can not have all the information. Bremer has other counsel."

2. That the Bremer Tape transcripts disclose the following:

(a) That Gallagher & Company was represented by or relied on a number of law firms in the Warehouse offering, including an attorney in Denver and Messrs. Beers and Wilkes of the Beers firm in New York.

(b) that Mr. Gallagher dealt with an attorney other than the Respondent in conjunction with questions as to the "minimum offering" and closing thereon.

(c) That Ms. Francesca Daniels, a financial consultant and friend of the Respondent, could have arranged to properly close the offering, had the participants elected to use her services.

(d) That Bremer deliberately deceived Gallagher with reference to the minimum offering by referring to faked conversations with the Securities and Exchange Commission.

(e) That Bremer plotted to close the offering notwithstanding any opinion that the Respondent might have with reference to the indictment of Bremer.

(f) That Bremer and Granai deliberately plotted to keep the Respondent ignorant of the proposed closing until the last minute, when the Respondent would be physically unable to discover adverse facts or prevent the closing.

(g) That all participants thought the final date for the closing was April 22, 1985.

(h) That Bremer plotted the fraudulent closing scenario without participation or knowledge by the Petitioner, significantly prior to April 19, 1985.

(i) That Bremer had no respect for the truth.

(j) That Bremer plotted with Granai to assure that Gallagher would not find out about the illegal loans.

(k) That Bremer claimed to have put a lot of money into Warehouse.

(l) That Bremer discussed the delay in closing directly with members of the Securities and Exchange Commission's Boston regional Office prior to the closing.

(m) That Bremer and Granai had not met commitments to provide verifying information made to Gallagher and the Respondent prior to the closing.

(n) That Bremer told numerous persons that he had been entitled to reimbursement for advances to Warehouse directly from closing proceeds, had factored such receivable and arranged for an affiliate to invest in Warehouse with the proceeds.

(o) That upon discovery that there had been a problem with the Warehouse closing, the Respondent's first concern was for compliance with law by requesting that trading in Warehouse be stopped.

(p) That during the District Court action by the Securities and Exchange Commission against the Respondent, Bremer lied to the Respondent concerning the basis for the Securities and Exchange Commission's investigation, thereby misdirecting the conduct of the Respondent's defense.

(q) That Bremer concocted the story that he was totally innocent of the charges reflected in the indictment.

(r) That the Respondent believed everything involving the Warehouse offering was proper

during the unscheduled meeting in the respondent's office on April 19, 1985.

(s) That the sums paid to Bremer's order (*i.e.*, to Richmond) from the offering proceeds) were paid as reimbursements for advances used for expenses disclosed in the registration statement as payable from proceeds of the offering.

3. That Edward Thomas Kalinowski, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Bremer was looking for personal loans using the claim of entitlement to proceeds from the Warehouse closing for prepaid advertising advances significantly prior to April 19, 1985.

(b) Mr. Granai had opined that such loans were legal.

(c) Everyone involved believed that April 22, 1985 was the proper closing deadline.

4. That Marvin Richmond, in his testimony and depositions for the Securities and Exchange Com-

mission pertaining to the Warehouse matter, stated that:

(a) He verified that he would be repaid for his loan to Bremer directly from the escrow proceeds at the closing, in a call to the Barnett Bank as the escrow agent, prior to requesting verification from the Petitioner.

(b) The Petitioner's Disbursement Instructions Letter to Barnett Bank, as the escrow agent, arrived at the offices of the Barnett Bank after the escrow agent had made arrangements for the closing in the afternoon of April 22, 1985.

(c) Mr. Richmond totally, completely and repeatedly discussed the nature of his loan to Bremer with Barnett Bank's representative in charge of the Warehouse closing, prior to the closing, including disclosure of his profit on the transaction.

(d) The Petitioner had been led to believe that Messrs. Richmond and Bremer were long time acquaintances.

(e) The Petitioner played no role in arranging the Richmond transaction, other than confirming the contents of the Disbursement Instructions Letter to Richmond in a telephone conversation.

(f) The Petitioner believed the Richmond loan involved the factoring of a Bremer receivable.

(g) Kalinowski vehemently claimed to be awaiting a $250,000 wire for deposit into the escrow account at the closing, and was extremely upset when the closing was not extended in order to accommodate his clients' subscriptions.

(h) Barnett Bank's representative, not the Petitioner, was responsible for the closing.

(i) The Petitioner arrived at Barnett Bank's offices after the participants had broken for lunch.

5. That Raymond Crane, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Bremer indicated that the Warehouse offering was going to be oversubscribed, rather than merely closing at the minimum offering.

(b) Bremer was soliciting personal loans at least three weeks prior to the closing, claiming that the transactions were totally legal.

(c) Barnett Bank, not the Petitioner, was responsible for the closing.

(d) Bremer paid Crane, out of everyone's view.

(e) Bremer lied to Crane concerning the reason for the Securities and Exchange Commission's investigation of Warehouse, claiming that it was caused by gallagher's refusal to sell the stock purchased by Bremer's affiliate at the closing.

(f) The closing had been scheduled for April 19, 1985, but was postponed until April 22, 1985.

6. That Donald Ehrlich, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Bremer lied to everyone concerning the nature of the Securities and Exchange Commission's investigation into the Warehouse matter.

(b) Richmond believed that the loan to Bremer was legal.

(c) Bremer intended to violate securities laws by paying compensation not disclosed in the Warehouse registration statement, withholding such information from his attorneys.

(d) Bremer claimed to have exhausted his personal funds in making advances to Warehouse.

(e) Immediately prior to the closing, Gallagher believed that the minimum offering had been subscribed to.

(f) Bremer claimed that the minimum offering had been subscribed to during the week prior to the Warehouse closing.

(g) He was present during an informal social gathering at a Fort Lauderdale waterfront restaurant (Shooters) at which the Warehouse

party and the Petitioner met, and there were no discussions of loans or closing gimmicks.

(h) Messrs. Bremer and Granai claimed that they, rather than Gallagher, had been responsible for the success of the Warehouse closing.

7. That Dean Scholl, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Granai was a securities and investments attorney.

(b) Granai's background as an Annapolis graduate and naval officer lent him a presumption of credibility.

(c) He never had discussions concerning Warehouse with the Petitioner.

(d) The structure of his proposed involvement with Warehouse was changed, on or about April 10, 1985, when it was determined that a subscription and guaranteed buy back would not be legal.

(e) Granai described that a loan transaction to Bremer, repaid from proceeds legally obtained by Bremer at closing would have been legal, and that the concept was developed by Granai, Bremer and him, during a meeting on or about April 10, 1985.

(f) He relied on Barnett Bank's involvement in making his investment decision.

(g) Scholl never disclosed his role as a lender in the Warehouse offering to the Petitioner.

8. That John J. Stewart, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Bremer lied to him concerning the nature of the Securities and Exchange Commission's investigation of Warehouse.

(b) Bremer was looking for bridge loans for Warehouse during March of 1985.

(c) Bremer claimed that Warehouse had incurred significant expenses during the offering for

advertising, mail order catalogues and in connection with a Radio Shack contract.

(d) Bremer claimed to have receivables with which he could collateralize loans.

(e) A major element giving the proposed loan transaction credibility was the participation of Barnett Bank as the escrow agent.

7. That the Securities and Exchange Commission's administrative law judge in the Petitioner's 2(e) proceeding found that:

(a) The Petitioner had been deceived by Messrs. Bremer and Granai.

(b) The Petitioner's demeanor, the testimony of his witnesses and the suffering occasioned to him and his family as a result of the Warehouse matter mitigated against a permanent bar preventing the petitioner from practicing before the Securities and Exchange Commission.

(c) The conduct of the Securities and Exchange Commission's staff in the 2(e) proceeding was

appalling in that they deliberately distorted materials presented to the judge in support of their case.

(d) He was not free to consider the underlying facts, as a result of Securities and Exchange Commission rules.

8. The Petitioner has fully complied with the penalties imposed by the Securities and Exchange Commission's administrative law judge in the 2(e) proceeding.

9. The decision in the Securities and Exchange Commission's 2(e) proceeding was based on the decision of the District Court in the Warehouse case.

10. the decision of the District Court in the Warehouse case was purportedly based exclusively on the Petitioners admissions.

11. The admissions on which the District Court based its decision against the petitioner in the Warehouse matter are governed by Rule 36 of the Federal Rules of Civil Procedure.

12. By its terms, Rule 36 of the Federal Rules of Civil Procedure specifically provides that admissions made thereafter are effective only for such case, and cannot be used for any other purpose.

13. If the decision of the Securities and Exchange Commission's administrative law judge was based on a decision exclusively relying on admissions provided under Rule 36 of the Federal Rules of Civil Procedure, such decision was improper.

14. There is no evidence of any wrongdoing or improper behavior by the Petitioner since resumption of his practice upon termination of his bar against practice before the Securities and Exchange Commission.

15. The Securities and Exchange Commission is barred from regulating the practice of law by the Administrative Procedures Act.

16. The Securities and Exchange Commission claims that proceedings under Rule 2(e) are legal because they do not involve regulation of the legal profession but rather, merely regulate the Securities and Exchange Commission's internal procedures of practice."

Case Cited From CCH F.Sec.L.Rep., at 98,219

CCH F.SEC.L.Rep. Paragraph 98,219

Austin, et al. v. Bradley, Barry & Tarlow, P.C., et al.

United States District Court for the District of Massachusetts

Civ. A. No. 85-4767-S, April 30, 1993

Opinion in Full Text.

1. Exchange Act--Antifraud--Attorneys--Disclosure Duty.--Investors were unable to maintain a Section 10(b) claim alleging that an offering memorandum was misleading because a defendant law firm failed to disclose its knowledge of its client's insolvency. Imposing a duty on the law firm to disclose its client's insolvency to nonclient investors would conflict directly with the law firm's concurrent obligation of confidentiality to its client. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

2. Exchange Act--Antifraud--Aiding and Abetting--Attorneys.--Investors failed to establish a Section 10(b) aiding and abetting claim against a law firm that did not disclose its client's insolvency in an offering memorandum. There was no allegation that the law

firm benefited from its silence; the law firm's economic motivation, in the form of legal fees, was too remote and minimal to demonstrate that the firm's silence was designed intentionally to aid the alleged primary fraud. Also, the investors failed to refute the law firm's assertion that its silence was motivated solely by its professional obligation of confidentiality. See FSLR P22,721 and FSLR P22,725, "Exchange Act --Manipulations; National Market System" division, Volume 3.

Opinion of Skinner, Senior District Judge.

This case and three related actions were brought by four investors in a fall 1982 yacht sale and management offering by Ocean Limited.[105] The defendants, the law firm Bradley, Barry & Tarlow, P.C. and two of its partners, Edward T. Tarlow and Richard P. Breed, III (collectively referred to as BB & T), served as legal counsel to Ocean and prepared a significant portion of the allegedly fraudulent offering memorandum. The crux of the plaintiffs' claims against BB & T is that the offering memorandum was misleading because it failed to disclose material

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105. The three related cases are (1) Werner-Stewart, Inc. v. Ocean Limited, C.A. No. 84-0653-S (D.Mass.), (2) Austin v. Ocean Limited, C.A. No. 84-0654-S (D.Mass.). and McCurtain v. Ocean Limited, C.A. No. 84-4146-S (D.Mass.).

information regarding Ocean's insolvency and inability to fulfill future obligations under the management plan. The defendants move for summary judgment, asserting that the plaintiffs are unable to establish a material element of their remaining claims[106] --that BB & T was under any duty to disclose.

DISCUSSION

Summary judgment is appropriate where the record reveals that, " `there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " FDIC v. World Univ., Inc., 978 F.2d 10, 13 (1st Cir.1992) (quoting FED. R.CIV.P. 56(c)). Rule 56 mandates that judgment be entered against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

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106. In my June 17, 1992 order, I allowed in part BB & T's previous motion for summary judgment, which was based on alternative grounds. Austin v. Bradley, Barry & Tarlow, P.C., No. 85-4767-S (D.Mass. June 17, 1992). The remaining claims are as follows: violation of section 10(b) and Rule 10b-5 (Count I), aiding and abetting violation of S10(b) and Rule 10b-5 (Count II), common law fraud and deceit (Count VIII), aiding and abetting fraud and deceit (Count VIII), negligence (Count IX), and negligent misrepresentation (Count X). The facts relevant to BB & T's present motion, viewed in the light most favorable to the plaintiffs, were fully discussed in my June 17, 1992 order and require no elaboration.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The facts must be viewed in the light most favorable to the party opposing summary judgment. FDIC v. World Univ., Inc., 978 F.2d at 13.

1. Primary Liability

Our court of appeals has made eminently clear that "[e]ven if the information is material, there is no liability under Rule 10b-5 unless there was a duty to disclose it." Backman v. Polaroid Corp., 910 F.2d 10, 13 (1st Cir. 1990) (quoting Roeder v. Alpha Indus., Inc., 814 F.2d 22, 26 (1st Cir. 1987)). The plaintiffs here do not contend that BB & T's duty to disclose arose from any prior affirmative misrepresentations, insider trading, or violation of any statutory or regulatory disclosure requirements. See Roeder v. Alpha Indus., Inc., 814 F.2d at 27. Instead, the plaintiffs assert that the offering memorandum was misleading because BB & T remained silent, failing to disclose its knowledge of Ocean's insolvency. The plaintiffs further allege that BB & T was obliged to disclose this material information because, by preparing significant portions of the fall 1982 offering memorandum, BB & T assumed a duty to third party investors who BB & T knew would reasonably and detrimentally rely on the completeness and accuracy of BB & T's professional services. In support of the existence

of such a duty, the plaintiffs rely primarily on state law. See Camp v. Dema, 948 F.2d 455, 461 (8th Cir.1991) (fiduciary duty and corresponding duty to disclose may be established by state or federal law).

Under Massachusetts law, "an attorney owes a duty to nonclients who the attorney knows will rely on the services rendered." Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 536 N.E.2d 344, 350 (citing Page v. Frazier, 445 N.E.2d 148, 154 (Mass. 1983)), cert. denied 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 192 (1989). However, courts will not infer a duty to nonclients if to do so would impose "conflicting duties on attorneys." Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 1015, 1018 (1993); see also Robertson v. Guston Snow & Ely Bartlett, 536 N.E.2d at 350 (" `[W]here an attorney is also under an independent and potentially conflicting duty to a client,' we are less likely to impose a duty to nonclients.") (quoting Page v. Frazier, 445 N.E.2d at 153). The record here reveals that imposing a duty on BB & T to disclose Ocean's insolvency to nonclient investors like the plaintiffs would conflict directly with BB & T's concurrent obligation of confidentiality to its client. Accordingly, I decline to infer such a duty in this case.

The plaintiffs' reliance on this court's opinion in Norman v. Brown, Todd & Heyburn, 693 F.Supp. 1259,

1265 (D.Mass.1988) (Skinner, J.), as authority for the contrary conclusion is misplaced. First, Norman was decided without benefit of the Supreme Judicial Court's recent decision in Logotheti and, as a result, did not fully consider the potential for conflicting professional obligations. Second, the focus in Norman was on the existence of a duty of reasonable care owed by an attorney to nonclient investors in a negligence context. Id. The case did not address the existence of a fiduciary or other special relationship necessary to create a duty to disclose under federal securities law. Cf. Agapitos v. PCM Invest. Co., 809 F.Supp. 939, 946 (M.D.Ga.1992) (duty of reasonable care arising under Georgia professional negligence law did not create a fiduciary relationship between parties actionable under federal securities law).

Similarly misplaced is the plaintiffs' reliance on Ackerman v. Schwartz, 947 F.2d 841 (7th Cir.1991) as authority for a duty to speak arising from federal common law. Unlike the present case, Ackerman involved an attorney who prepared an opinion letter containing affirmative misrepresentations. Id. at 843. While the court observed that the attorney had no duty to "blow the whistle" on his clients, the attorney was still liable for "a material lie." Id. at 848. Accordingly, the Seventh Circuit reversed entry of summary judgment to the extent the attorney permitted the promoters to release his opinion letter to investors. Id.

Simply stated, having elected to speak, the attorney in Ackerman was obliged to tell the truth. See Id.

In contrast, the plaintiffs here do not allege that BB & T made any prior affirmative misrepresentations or misleading disclosures giving rise to a comparable duty to speak. See Backman v. Polaroid Corp., 910 F.2d at 16-17 (duty to disclose arises only to correct or update what would otherwise be a materially misleading prior statement by the defendant). The plaintiffs premise BB & T's duty to speak on the allegedly misleading nature of the offering memorandum, which they alleged was misleading only because BB & T remained silent. Circular reasoning, however, is not a persuasive basis for abandoning the well-settled rule that "silence absent a duty to disclose, is not misleading under Rule 10b-5." Chiarella v. United States, 445 U.S. 222, 235, 100 S.Ct. 1108, 1117, 63 L.Ed.2d 348 (1980).

In short, the plaintiffs are unable to establish an element essential to their federal securities law claims and BB & T is entitled to summary judgment on Count I of the complaint. Absent any "fiduciary or other similar relation of trust and confidence between [the parties]," Id. at 228, 100 S.Ct. at 1114, BB & T had no duty to disclose its knowledge of Ocean's insolvency to potential investors. See Schatz v. Rosenberg, 943 F.2d 485, 490-92 (4th

Cir.1991) (". . . unless a relationship of `trust and confidence' exists between a lawyer and a third party, the federal securities laws do not impose on a lawyer a duty to disclose information to a third party."), cert. denied, U.S. , 112 S.Ct. 1475, 117 L.Ed.2d 619 (1992); accord, Renovitch v. Kaufman, 905 F.2d 1040, 1048 (7th Cir.1990) (absent a fiduciary relationship with third party investor, law firm had no duty to disclose financial information about client to investor).

2. Secondary Liability

To establish liability as an aider and abettor of a violation of S10(b) or Rule 10b-5, the plaintiffs must establish the following three elements:

1. the commission of a violation of S10(b) or Rule 10b-5 by the primary party;

2. the defendant's general awareness that his role was part of an overall activity that is improper; and

3. knowing and substantial assistance of the primary violation by the defendant.

Cleary v. Perfectune, Inc. 700 F.2d 774, 777 (1st Cir.1983) BB & T asserts that, as a matter of law, it cannot

be held secondarily liable as an aider and abettor of securities law violations because, absent a duty to disclose, its silence cannot constitute "knowing and substantial assistance" of the primary violation. See Kline v. First W. Gov't Sec., 794 F.Supp. 542, 554 (E.D.Pa.1992).

The defendants' argument is overstated. Several courts have held that inaction or silence may constitute knowing and substantial assistance of the primary violation where the "defendant recklessly violates an independent duty to act or manifests a conscious intention to further the principal violation." See, e.g., Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 36 (D.C.Cir.1987) (citing Cleary v. Perfectune, Inc., 700 F.2d at 778). Since I have already determined that BB & T was under no independent duty to act, that is, to speak, BB & T can only be liable as an aider and abettor if its silence was consciously intended to further the principal violation.[107]

In determining whether silence was accompanied by a conscious intent to assist the primary violation, courts query whether the "defendant has thrown in his lot with the primary violators." DiLeo v. Ernst & Young, 901 F.2d 624, 629 (7th Cir.) (quoting Barker v. Henderson,

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107. While our court of appeals has declined to expressly adopt the conscious intent standard, it has implicitly recognized the doctrine's validity. Cleary v. Perfectune, Inc., 700 F.2d at 778.

Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir.1986)), cert. denied, 498 U.S. 941, 111 S.Ct. 347, 112 L.Ed.2d 312 (1990). Crucial to this determination is "whether the alleged aider-and-abettor benefitted from such silence." See, e.g., First Interstate Bank v. Pring, 969 F.2d 891, 899 (10th Cir.1992) (collecting cases). In making these determinations, courts have been " `particularly exacting.' " Smith v. American Nat'l Bank & Trust Co., 982 F.2d 936, 944 (6th Cir.1992) (quoting Moore v. Fenex, Inc., 809 F.2d 297, 303 (6th Cir.), cert. denied, 483 U.S. 1006, 107 S.Ct. 3231, 97 L.Ed.2d 737 (1987)).

Viewed against these standards and in the light most amiable to the plaintiffs, the record here fails to support a finding that BB & T's silence was "consciously intended" to assist the primary violation. First there is no allegation that BB & T benefitted from its silence. Cf. First Interstate Bank v. Pring, 969 F.2d at 900 (alleged aider and abettor's silence indicated conscious intent to aid the primary violation where aider and abettor had "substantial personal stake" in success of allegedly fraudulent bond issue). While presumably BB & T received a fee for its legal services, this economic motivation alone is too remote and minimal to demonstrate that BB & T's silence was " `designed intentionally to aid the primary fraud.' " National Union Fire Ins. Co. v. Turtur, 892 F.2d 199, 207

(2d Cir.1989) (premiums received by insurance company insufficient to demonstrate conscious intent) (quoting Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir.1983)); see also DiLeo v. Ernst & Young, 901 F.2d at 629 (accountant fees received over a two-year period found insufficient to demonstrate conscious intent on part of alleged aider and abettor). Second, the plaintiffs have failed to refute BB & T's assertion that its silence was motivated solely by its professional obligation of confidentiality. Under Rule 56, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e).

Accordingly, the defendants are entitled to summary judgment as to Count II of the complaint. See Cleary v. Perfectune, Inc., 700 F.2d at 778-79 (affirming entry of summary judgment against plaintiffs who failed to introduce any evidence demonstrating that defendants' silence was consciously intended to further fraudulent scheme).

3. State Law Claims

In light of the foregoing finding that BB & T was under no duty to disclose Ocean's insolvency to the plaintiffs, BB & T is also entitled to summary judgment on the plaintiffs' common law negligence (Count IX) and fraud (Count

VII) claims. Absent a duty to disclose, there can be no negligence or fraud arising from BB & T's silence. Maruho Co. v. Miles, Inc., No. 92-10084-Z, 1993 WL 81453, at *4, 1993 U.S.Dist. LEXIS 3321, at *10 (D.Mass. Mar. 8, 1993) ("Negligence . . . presumes a duty."); Royal Business Group, Inc. v. Realist, Inc., 933 F.2d 1056, 1064 (1st Cir.1991) (under Massachusetts law, "there can be no actionable claim of fraud for failure to disclose in the absence of a duty to disclose").

Similarly, the plaintiffs' failure to demonstrate that BB & T's silence substantially assisted the primary violation mandates that judgment be entered in BB & T's favor on the plaintiffs' state law claim of aiding and abetting fraud (Count VIII). This is because under Massachusetts law liability for aiding and abetting a tort attaches where: (1) the defendant provides "substantial assistance or encouragement to the other party;" and (2) the defendant has "unlawful intent, i.e., knowledge that the other party is breaching a duty and the intent to assist that party's actions." Payton v. Abbott Labs, 512 F.Supp. 1031, 1036 (D.Mass.1981) (applying Massachusetts law).

Finally, with regard to the plaintiffs' claim of negligent misrepresentation (Count X), the plaintiffs have failed to demonstrate an element essential to their claim. Under Massachusetts law, a claim for negligent misrepresentation

generally requires privity between the parties. In re Bank of Boston Corp. Sec. Litig., 762 F.Supp. 1525, 1536 (D.Mass.1991). Absent privity, the plaintiffs must demonstrate that BB & T had actual knowledge of each plaintiffs' reliance. Id. (citing Hurley v. FDIC, 719 F.Supp. 27, 34 (D.Mass.1989)). The record here fails to support either requirement. Viewed most favorably, the plaintiffs have alleged only that BB & T should have reasonably foreseen the plaintiffs' detrimental reliance on the allegedly incomplete offering memorandum. This allegation falls far short of demonstrating actual knowledge on BB & T's part.

CONCLUSION

The defendants' motion for summary judgment on the remaining counts of the complaint is allowed. The clerk is directed to enter final judgment in favor of the defendants on all counts of the complaint, the defendants to recover their costs.

Case Cited From CCH F.Sec.L.Rep., at 98,110

CCF F.SEC.L.Rep. Paragraph 98,110,

In re Cascade International Securities Litigation.

United States District Court, Southern District of Florida

Case No. 91-8652-CIV-NESBITT, December 15, 1993

Opinion in Full Text.

1. Exchange Act--Antifraud--Attorneys--Disclosure Duty.--Stock purchasers were unable to maintain a securities fraud action against two law firms whose client was the issuer, in that the purchasers failed to demonstrate any kind of fiduciary relationship between the law firms and the purchasers, and thus no duty to disclose existed. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

2. Exchange Act--Antifraud--Aiding and Abetting--Attorneys.--Section 10(b) aiding and abetting claims were not adequately alleged by stock purchasers against law firms whose client was the issuer, in that the requisite degree of scienter was not alleged and "substantial assistance" was not demonstrated. "Red flags" or "aroused suspicions" do not constitute actual awareness of one's role in a fraudulent scheme. Further, the complaint failed to show how the law firms' actions of

merely rendering legal opinions or coming to the defense of their client demonstrated more than activity constituting the "daily grist of the mill" of a law firm. Lastly, the purchasers failed to allege any activities by the law firms that constituted anything more than acting as scriveners for their client. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

3. Exchange Act--Antifraud--Accountants--Audits--Disclosure Duty.--An accounting firm that acted as the auditor for two of an issuer's subsidiaries, but not as the accountant for the issuer, could be found to have violated a duty to disclose negative information to the public, by allegedly failing to disclose claimed false information contained in the issuer's Form 10-K, which the accounting firm allegedly knew to be false. When the auditor of a subsidiary knows of the fraudulent activities of the parent, it has a duty to disclose this information. See FSLR P22,721 and FSLR P22,725, "Exchange Act --Manipulations; National Market System" division, Volume 3.

4. Exchange Act--Antifraud--Accountants--Fraud on the Market--Reliance.--Stock purchasers adequately alleged reliance through the fraud on the market theory in their antifraud claim brought against an accounting firm that

acted as the auditor for two of the issuer's subsidiaries, but not as the accountant for the issuer. The purchasers alleged that by not revealing information that the accounting firm had a duty to reveal, the accounting firm contributed to the claimed fraud on the market that led to the increased price of the issuer's stock. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

5. Exchange Act--Antifraud--Aiding and Abetting--Accountants.--Stock purchasers sufficiently alleged a Section 10(b) aiding and abetting claim against an accounting firm that acted as the auditor for two of the issuer's subsidiaries, but not as the accountant for the issuer. The purchasers alleged sufficient facts, such as (1) the accounting firm's active attempts to avoid consolidating one subsidiary's financial statements with the issuer's and (2) the accounting firm's failure to disclose relevant information after the publication of the issuer's Form 10-K, that the accounting firm knowingly and substantially participated in the alleged fraud. Merely because the accounting firm did not publish the Form 10-K did not mean that the firm could not know of the alleged fraud and actively aid in perpetuating it through the alleged activities. See FSLR P22,721 and FSLR

P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

6. Exchange Act--Antifraud--Aiding and Abetting--Underwriters--Knowledge.-- Stock purchasers alleged a sufficient degree of knowledge in a Section 10(b) aiding and abetting claim against an underwriter. The complaint specifically alleged that the underwriter knew that a large number of unauthorized shares had been issued by the issuer, knew that these shares were not transferable, and yet sold the shares on the open market, which aided and abetted the claimed overall scheme. See FSLR P22,721 and FSLR P22,725, "Exchange Act --Manipulations; National Market System" division, Volume 3.

7. Securities Act--Liabilities--Sellers--Underwriters.-- Allegations that an underwriter's prospectus failed to disclose that the shares it was offering were unauthorized met the requirements for alleging a Section 12(2) violation. See FSLR P4735, "Securities Act--Liabilities" division, Volume 2.

8. Securities Act--Liabilities--Sellers--Reliance.--A Section 12(2) claim by stock purchasers could not be dismissed on grounds of inadequate allegations of reliance, since the purchasers were not required to

show reliance on the actual prospectus, but only that the prospectus contained misrepresentations or omitted material facts, and the purchasers alleged that there were inaccuracies in the prospectus. See FSLR P4735, "Securities Act --Liabilities" division, Volume 2.

9. Securities Act--Liabilities--Sellers--Initial Offerings.--In a Section 12(2) claim, plaintiff stock purchasers sufficiently alleged that the shares at issue were purchased from the defendant underwriter through an initial offering, in that the purchasers alleged that the underwriter's sales through the subject prospectus were initial offerings to the public and that the underwriter sold unregistered shares received from the issuer directly to the purchasers. See FSLR P4735, "Securities Act--Liabilities" division, Volume 2.

10. Exchange Act--Antifraud--Broker-Dealers--Scienter.--Stock purchasers adequately alleged the requisite "severe recklessness" in a Section 10(b) claim against a brokerage firm, in alleging that the firm represented that it had undertaken an extensive independent investigation of the issuer prior to recommending the issuer's securities, and that it had continuously reassessed its evaluation of the issuer. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

11. Exchange Act--Antifraud--Aiding and Abetting--Broker-Dealers--Scienter.-- Investors adequately alleged sufficient activity on the part of a brokerage firm to indicate the requisite scienter necessary to maintain a Section 10(b) aiding and abetting claim against the firm. The investors alleged that the firm engaged in touting stock in a company that the firm said it had researched, when, in fact, that company was in severe financial trouble and had issued a fraudulent Form 10-K. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

Opinion of Nesbitt, District Judge.

This cause comes before the Court upon the Report and Recommendation of Magistrate Judge Barry L. Garber, filed May 19, 1993 (D.E. #219), regarding Defendant Deltec Securities Corporation's ("Deltec") Motion to Dismiss, filed September 16, 1992 (D.E. #128), Defendant Gunster, Yoakley & Stewart, P.A.'s ("GY&S") Motion to Dismiss, filed September 15, 1992 (D.E. #130), Defendants Aaron Karp, Howard Sommers, and Karp and Sommers's (collectively "K&S") Motion to Dismiss, filed September 30, 1992 (D.E. #147), Defendant Coopers & Lybrand's ("C&L") Motion to Dismiss, filed September

30, 1992 (D.E. #151), and Defendant Raymond James's Motion to Dismiss, filed October 1, 1992 (D.E. #155).[108]

I. BACKGROUND

This action arises from the allegedly fraudulent activities of two law firms, an accounting firm, a securities broker, and an underwriter, as well as the officers and directors of the corporation, in relation to the issuance of shares of stock in Cascade International, Inc. ("Cascade"). Cascade was a publicly traded company made up of three divisions: cosmetics, fashion boutiques, and women's apparel stores. Throughout the late 1980s, Cascade acquired a number of clothing stores, and had intended to sell cosmetics fromcounters within these stores. By 1991, however, the Securities and Exchange Commission ("SEC") had begun to investigate Cascade, and in December of 1991, Cascade filed for bankruptcy after revelations that it had grossly misrepresented the number of cosmetic stores it operated, and after its President and Chief Executive Officer, Victor Incendy, had disappeared.

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108. While Plaintiffs' Consolidated Amended Class Action Complaint, filed July 7, 1992 (D.E. #79) ("Complaint") alleges violations against defendants other than the above five, only these five groups of defendants, K&S, GY&S, C&L, Deltec, and Raymond James (collectively "Defendants") chose to file motions to dismiss.

In July of 1991, a number of complaints were filed in federal court by purchasers of the common stock of Cascade which primarily alleged violations of the securities laws against the above-named Defendants. These actions were soon consolidated into one class action, and this consolidated action was given multi-district litigation status.

In their class action complaint, Plaintiffs accuse all Defendants of making materially misleading statements or omissions. Specifically, K&S, a law firm, is accused of making misrepresentations in Cascade's filings with the SEC. GY&S, another law firm, is accused of making misleading statements, allegedly in an attempt to hide Cascade's fraudulent activity, to people who were investigating the strength of Cascade. Plaintiffs allege that C&L, an accounting firm, made fraudulent misrepresentations in the process of auditing two of the subsidiaries of Cascade, Fran's Fashions, Inc., and Conston, which were retailers of women's clothing. C&L is also accused of furthering the fraudulent activity by failing to disclose that Cascade's filings with the SEC were highly inaccurate. Raymond James, a securities broker, is accused of making false misrepresentations in the process of selling Cascade's stock. Finally, Plaintiffs allege that Deltec, an underwriter for Cascade's stock, acquired over a million unregistered

shares from Cascade which it sold on the market in violation of the securities laws.

The Complaint alleges violations by all Defendants of S10(b) of the Securities Exchange Act of 1934, 15 U.S.C. S78j(b) ("S10(b)"), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. S240.10b-5 ("Rule 10b-5"), as well as alleges state common law claims for negligent misrepresentation and fraud. In addition, the Complaint also alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RIC0"), 18 U.S.C. S1961 et seq., against K&S, only, and alleges that Deltec violated SS12(1) and 12(2) of the Securities Act of 1933, 15 U.S.C. S77l(1)-(2)("S12"). The accused Defendants have moved to dismiss these allegations.

Magistrate Judge Barry L. Garber, in his Report and Recommendation filed May 17, 1993 (D.E. #219), recommended that all counts be dismissed against the law firms, K&S and GY&S, because Plaintiffs, inter alia, had failed to establish a duty to disclose on the part of a law firm to individuals with which the law firm did not have a fiduciary relationship. The Magistrate Judge also recommended that the counts for common law negligent misrepresentation and fraud be dismissed as to all Defendants for Plaintiffs' failure to adequately allege their reliance on the alleged misrepresentations or omissions made by Defendants. All

other counts, the Magistrate Judge stated, should not be dismissed, as Plaintiffs have adequately alleged all elements of these causes of actions.

All parties have filed objections and responses to the Magistrate Judge's Report and Recommendation. The Court is required to conduct a de novo review of both these objections and the original motions to dismiss. 28 U.S.C. S636(b)(1) (1993) ("A judge of the Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.")

II. STANDARD OF REVIEW

The standard of review for a motion to dismiss has been clearly established. Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a court to dismiss a claim on the basis of a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 326 (1989). However, the Court is confined to a review of the allegations pleaded in the Complaint, must accept those allegations as true, and must resolve any factual issues in a manner favorable to the non-movant. See Quinones v. Durkis, 638 F. Supp. 856, 858 (S.D. Fla. 1986). Thus, a claim may be dismissed pursuant to Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts consistent with the allega-

tions. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Furthermore, Rule 9(b) of the Federal Rules of Civil Procedure requires that any allegations of fraud in a complaint must be stated with particularity.[109] However, while Rule 9(b) "serves an important purpose in fraud actions by alerting defendants to the `precise misconduct with which they are charged,'" the requirements of Rule 9(b) "must not abrogate the concept of notice pleading." Durham v. Business Management Associates, 847 F.2d 1505, 1511 (11th Cir. 1988) (quoting Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3rd Cir. 1984), cert. denied, 469 U.S. 1211 (1985)); (quoting Friedlander v. Nims, 755 F.2d 810, 813 n.3 (11th Cir. 1985)). Therefore, "while mere conclusory allegations of fraud will not satisfy Rule 9(b), allegations which provide a reasonable delineation of the underlying acts and transactions allegedly constituting the fraud are sufficient." In re Sahlen & Associates, Inc. Securities Litigation, 773 F. Supp. 342, 352 (S.D. Fla. 1991).

Applying these principles, and after careful consideration of the Magistrate Judge's Report and Recommendation

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109. Rule 9(b), Fraud, Mistake, Condition of the Mind, states that, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).

and a de novo review of the record, it is hereby ORDERED and ADJUDGED that the Report and Recommendation is adopted in its entirety for the reasons set forth below.

III. DEFENDANTS AARON KARP, HOWARD SOMMERS, KARP AND SOMMERS, AND GUNSTER, YOAKLEY & STEWART, P.A.

In summary, the Magistrate Judge recommended that all counts of the Complaint be dismissed against the two law firms, K&S and GY&S, because Plaintiffs failed to demonstrate a law firm's duty to disclose negative information about a client to anyone with whom the law firm does not have a fiduciary relationship.

Plaintiffs object to this recommendation by stating that K&S helped prepare Cascade's fraudulent filings with the SEC, as well as drafted letters to shareholders and press releases which stated erroneous facts. Plaintiffs also argue that GY&S violated the securities laws by defending Cascade against accusations made by the press, securities analysts, and members of the public that the company was in financial difficulty, without investigating whether the representations made by GY&S on behalf of Cascade were true, as well as threatening those individuals with legal action if they investigated Cascade or published articles about the financial condition of the company. Also, Plaintiffs ac-

cuse GY&S of giving advice to Cascade without properly and fully investigating their client. Plaintiffs further argue that both firms discovered and ignored numerous "red flags," i.e., facts which Plaintiffs allege should have made the defendant law firms aware that Cascade was committing fraud, or at least compelled them to investigate their client.

Defendants K&S and GY&S respond by arguing that any representations that they made were only done on behalf of the client and were not representations made on behalf off the law firms to third parties, that the law firms were mere "scriveners" for Cascade, and that they had no fiduciary relationship, and thus no duty, to anyone but Cascade. Furthermore, the law firms argue, they never issued legal opinions to the general public but only to their client Cascade. The law firms also argue that they had no duty to investigate Cascade, no duty to "tattle" on their client, and had, in fact, an ethical duty not to reveal client confidences. Attorneys, the law firms argue, do not have the same duties as other professionals, like accountants and securities brokers, because they do not represent their own opinions about their client, but only act as a conduit for the client's opinions.

A. 10(b) and Rule 10b-5 Allegations

As the Magistrate Judge correctly determined, in order for a cause of action to be maintained under S10(b)[110] and Rule 10b-5,[111] a plaintiff must allege that a defendant made a misstatement or omission of a material fact. Moreover, most circuits, including the Eleventh Circuit, have held that a defendant's misstatement or omission is actionable under

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110. 15 U.S.C. S78j, Manipulative and deceptive devices, provides that:

> It shall be unlawful for any person, directly or indirectly. . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

111. 17 C.F.R. S240.10b-5, Employment of manipulative and deceptive devices, provides that:

> It shall be unlawful for any person, directly or indirectly . . .
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

S10(b) and Rule 10b-5 only if the defendant had a duty to disclose negative information to the plaintiff. See Rudolph v. Arthur Anderson & Co., 800 F.2d 1040, 1043 (11th Cir. 1986), cert. denied, 480 U.S. 946 (1987) ("Rule 10b-5, however, is not read literally. Instead, a defendant's omission to state a material fact is proscribed only when the defendant has a duty to disclose."). While the Eleventh Circuit has found a duty to disclose when the defendant was an accountant, see Rudolph, 800 F.2d at 1043 (quoting Woodward v. Metro Bank of Dallas, 522 F.2d 84 (5th Cir. 1975)), or a banker, see Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004 (11th Cir. 1985), there has been no decision in this circuit specifically creating this duty to disclose on the part of an attorney.

However, the Fourth, Fifth, and Seventh Circuits have all held that an attorney does not have a duty to disclose potentially negative information about a client to a third party absent some kind of fiduciary relationship with the third party. See Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 1475 (1992); Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988), cert. denied, 492 U.S. 918 (1989); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490 (7th Cir. 1986). Furthermore, the Eleventh Circuit has established a set of factors which a court must consider in weighing whether a professional had a duty to disclose

negative information to the general public about a client. As Rudolph explained:

> In evaluating the circumstances, `we consider the relationship between the plaintiff and defendant, the parties' relative access to the information to be disclosed, the benefit derived by the defendant from the purchase or sale, defendant's awareness of plaintiff's reliance on defendant in making its investment decision, and defendant's role in initiating the purchase or sale.'

Rudolph, 800 F.2d, at 1043 (quoting, Woodward, 522 F.2d at 97 n.28). The Court must look at the circumstances of each case in determining, whether a duty to disclose exists. Woodward, 522 F.2d at 97 n.28., Reviewing these factors and the facts of this case, the Court concludes that few, if any, of the factors are supported by the allegations in the Complaint. Therefore, the Court finds that Rudolph does not warrant the creation of a duty to disclose negative information, about a client on the part of an attorney.

As Plaintiffs have failed to demonstrate any kind of fiduciary relationship between the defendant law firms and Plaintiffs, no duty to disclose exists, and, therefore, no action for securities fraud can be maintained against the

defendant law firms. While Plaintiffs cite many cases in which a court allowed an action to progress against a lawyer or law firm, these cases involved direct misrepresentations made by the defendant law firm to a plaintiff with which the law firm had a fiduciary relationship. See, e.g., FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir. 1992) (finding a duty when law firm prepared documents to investors); Molecular Technology Corp. v. Valentine, 925 F.2d 910 (6th Cir. 1991) (finding duty when law firm was in charge with editing public documents it knew to be false). Here, although GY&S may have made misrepresentations to parties other than their clients, Plaintiffs have not alleged a fiduciary relationship between GY&S and a third party to establish a duty to disclose. Accordingly, the counts alleging primary violation of S10(b) and Rule 10(b)-5 must be dismissed against the defendant law firms.

Plaintiffs argue that to dismiss the defendant law firms because they had no duty to disclose negative information to the public would allow law firms to act with impunity in issuing misleading legal opinions. However, what Plaintiffs fail to admit is that the actions of these law firms did not rise to such a level that they were expected to give full and accurate representations to third parties. These law firms represented Cascade, not any third party, and therefore did not have duty to investigate their client. While Plaintiffs claim a great injustice would be done to pur-

chasers of Cascade stock if these law firms were to be dismissed from the suit, this Court does not believe that the current law requires a law firm to direct its activities from representation to investigation of their clients at the slightest suggestion that their clients may be involved in unsavory activities. The Court will not go so far as to require law firms to fully investigate their clients at any hint that they may be conducting fraudulent activities, and then to punish the law firms if they do not do so. Otherwise, the law firms would be charged with a duty to the public at large to "tattle" on their clients. See Abell, 858 F.2d 1104, 1133 (quoting Barker, 797 F.2d at 497) (" `Neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose. To the contrary, attorneys have privileges not to disclose.' "). For all their rhetoric, Plaintiffs have failed to indicate what duty the defendant law firms had. As Plaintiffs have failed to allege that the law firms represented them, no duty has been created between, them or with the public at large, and, therefore, the counts for primary violations of S10(b) and Rule 10b-5 cannot be maintained and must be dismissed.

B. Aiding and Abetting Allegations

Plaintiffs' Complaint also alleges liability on the part of the defendant law firms K&S and GY&S for aiding and abetting securities fraud. The Magistrate Judge recom-

mended that these counts be dismissed as well, because Plaintiffs have failed to allege facts which indicate that the defendant law firms had the conscious intent necessary to maintain an action for aiding and abetting.

Plaintiffs argue in their objection that the fact that the defendant law firms ignored the numerous "red flags," as well as their active participation in threatening third parties with legal action if they investigated Cascade, demonstrates the high degree of knowledge, or scienter, necessary to maintain the aiding and abetting counts. Plaintiffs also argue that the "atypical" activities of the law firms in the manner in which they represented and defended Cascade is sufficient evidence to demonstrate the requisite scienter.

Defendants respond by stating that none of their activities were atypical, nor do Plaintiffs allege any facts sufficient to demonstrate sufficient knowledge on the part of the defendant law firms to be aiders and abettors.

As the Magistrate Judge correctly ascertained, the elements for aiding and abetting securities fraud are:

> `some other party has committed a securities law violation, . . . the accused party has general awareness that his role was part of an overall activity that is im-

proper, and . . . the accused aider-abettor knowingly and substantially assisted the violation.'

Woodward, 522 F.2d at 94-95 (quoting S.E.C. v. Coffey, 493 F.2d 1304, (6th Cir. 1974), cert. denied, 420 U.S. 908 (1975)). Looking specifically at the third element, Plaintiffs must demonstrate that Defendants "knowingly" assisted the violation, in other words, that they possessed the requisite scienter. Applicable precedent instructs that an evaluation of whether a defendant knowingly assists in the fraud "turns upon whether the aider and abettor defendant owed a duty to the plaintiff." Schatz, 943 F.2d at 496. If the defendant is under no duty to disclose, then the complaint must allege that the defendant acted with "a high degree of scienter, that is, with a `conscious intent' to aid the fraud." Woods, 765 F.2d at 1010. See also Schatz, 943 F.2d at 496 ("When there is no duty running from the alleged aider and abettor to the plaintiff, the defendant must possess a `high conscious intent' and a `conscious and specific motivation' to aid the fraud").

As previously determined in section III.A., supra, neither of the two law firms were under a duty to disclose their client's activities, and, therefore, Plaintiffs must demonstrate "conscious intent" on the part of Defendants to maintain the aiding and abetting counts of the Complaint. However, Plaintiffs have failed to sufficiently allege the

requisite degree of scienter. Plaintiffs argue that the allegations in their Complaint which assert that GY&S made statements to individuals others than their client establishes the requisite "conscious intent" necessary to meet this element. Furthermore, the numerous "red flags" should have warned the law firms of Cascade's fraudulent activity, and their failure to investigate their client demonstrated "conscious intent" to aid and abet the fraudulent activity.

However, "red flags," or "aroused suspicions," "do not constitute actual awareness of one's role in a fraudulent scheme." Abell, 858 F.2d at 1128. Furthermore, when no duty to disclose exists, "allegations that a defendant knew of the wrongdoing and did not act fail to state an aiding and abetting claim." Schatz, 943 F.2d at 496. Thus, allegations that the law firms merely failed to investigate their client is not sufficient to establish an aiding and abetting claim.

Moreover, as Woodward explained:

> In a case combining silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business involved. If the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without clear proof of intent to violate the securities laws. Con-

versely, if the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability.

Woodward, 522 F.2d at 97. Here, when allegations of the alleged "red flags" are removed, in accordance with Abell, Plaintiffs' Complaint fails to demonstrate how the law firms' actions of merely rendering legal opinions or coming to the defense of their client demonstrated more than activity constituting the "daily grist of the mill" of a law firm.

In addition, Plaintiffs have failed to demonstrate the existence of any "substantial assistance" on the part of Defendants as required by the aiding and abetting cause of action. This element has been defined as requiring more than allegations that the law firm acted as a scrivener for the client, but that the law firm "actively participate[d] in soliciting sales or negotiating terms of the deal on behalf of a client. . . ." Schatz, 943 F.2d at 497. The Court finds, in accordance with the Magistrate Judge's recommendation, that Plaintiffs have failed to allege any activities on the part of K&S and GY&S that constituted anything more than acting as scriveners for their clients or conducting activities that make up the "daily grist of the mill."

Therefore, without clear proof of intent to violate the securities laws, the Complaint fails to adequately allege

proper claims against K&S and GY&S for aiding and abetting securities fraud. Accordingly, those counts of the Complaint must also be dismissed.

C. RICO violations against Karp & Sommers

Plaintiffs have asserted claims against Defendant Karp & Sommers for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. SS1962(a)-(d), either as primary participants or as aiders and abettors.[112] The Magistrate Judge recommended that these counts be dismissed because Plaintiffs have failed to allege sufficient knowledge on the part of K&S of the fraudulent activity. Plaintiffs argue that the Complaint is replete with references to K&S's failure to investigate whether the large number of cosmetic counters Cascade represented to the public that it owned and operated actually existed. Defendant K&S responds that mere allegations that a law firm failed to investigate its client and drafted documents on behalf of its client are insufficient to demonstrate a RICO violation, and that mere reckless disregard for the activities of the client does not establish a RICO claim.

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112. 18 U.S.C. S1964(d) provides for civil remedies for violations of S1962.

In order for a count for RICO violations to survive a motion to dismiss, the Complaint must allege "two acts of racketeering with enough specificity to show that there is probable cause the crimes were committed. That determination is possible only if the factual basis of the predicate acts is set out with specificity." Banco de Desarrollo Agropecuario, S.A. v. Gibbs, 640 F. Supp. 1168, 1175 (S.D. Fla. 1986). Again, Plaintiffs have failed to demonstrate in their Complaint the requisite intent to defraud, and, therefore, have failed to sufficiently allege the factual basis of the predicate acts. Plaintiffs' only support for Defendants' knowledge is that the law firms allegedly drafted false press releases and recklessly disregarded facts about the financial condition of Cascade. However, reckless disregard is not a sufficient level of intent to allege the underlying crime. Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, 660 F. Supp. 1362, 1370 (D. Conn. 1987) ("Mere reckless disregard of the truth when drafting documents does not justify a finding of RICO civil liability on the basis that the party participated in the illegal enterprise."). Thus, to pursue an action for civil RICO, Plaintiffs must demonstrate Defendant's intentional participation in the conduct and affairs of the RICO enterprise. Becks v. Emery-Richardson, Inc., Nos. 86-6866-CIV-GONZALEZ, 87-1554-CIV-GONZALEZ, 1990 WL 303548, at *37 (S.D. Fla. Dec. 21, 1990). Plaintiffs have not alleged

K&S's intentional participation in the affairs of Cascade, and, therefore, the Complaint as to the RICO counts against K&S must be dismissed.

Furthermore, the Supreme Court, in a decision handed down this year, significantly limited the application of the RICO statute in civil suits. See Reves v. Ernst & Young, __ U.S. __, 113 S.Ct. 1163 (1993). Looking specifically at the language of S1962(c), the Court held that in order " `to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' S1962(c), one must participate in the operation or management of the enterprise itself." Id. at 1173. As Plaintiffs have demonstrated no evidence that the defendant law firms participated in the operation or management of Cascade, Plaintiffs' S1962(c) RICO claims, as well as all other claims brought pursuant to the RICO act, must be dismissed.

D. State Law Claims

The Court agrees with the Magistrate Judge's finding that because all of the federal claims have been dismissed from the Complaint as to K&S and GY&S, the Court should no longer exercise its pendent jurisdiction over the state claims.[113] Rice v. Branigar Organization, Inc., 922

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113. The state common law causes of actions for fraud and negligent misrepresentation should also be dismissed against the defen-

F.2d 788, 792 (11th Cir. 1991) ("When a district court dismisses all of the federal claims before trial, the decision whether or not to exercise pendent jurisdiction over state-law claims is within its discretion."). See also L.M.E., Inc. v. City of Hollywood, 605 F. Supp. 185, 190 (S.D. Fla. 1985). Accordingly, the pendent state claims against KY&S and GY&S should be dismissed as well.

E. Ethical violations

Nothing in this opinion should be read to indicate that the Court condones the actions of these two law firms, or that because they are to be dismissed from this entire action that they are entirely blameless in this fraud. The Court, as courts have held in the past, cannot express an opinion as to whether what the law firms did violated the rules of ethics. As both the Fourth and Seventh Circuit have stated:

> [A]n award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards in the legal . . . profession[]. Liability depends on an existing duty to disclose. The securities laws therefore must lag behind changes in ethical and fiduciary standards.

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dant law firms for failure to allege any reliance by Plaintiffs on statements made by the defendant law firms. See section VII, infra.

Schatz, 943 F.2d at 498 (quoting Barker, 797 F.2d at 497 (7th Cir. 1986)). This Court joins in agreement with that statement, and is bound by Plaintiffs' Complaint and the elements of the causes of action in considering whether the counts against the two law firms should be dismissed.

IV. COOPERS & LYBRAND

The Magistrate Judge recommended that the count for securities violations against the accounting firm Coopers & Lybrand should be allowed to remain, as Plaintiffs had sufficiently alleged all the requisite elements of a S10(b) and Rule 10b-5 claim. C&L objects to this recommendation by arguing that it did not act as the accountant for Cascade but only as the auditor for two of Cascade's subsidiaries, Fran's and Conston. Specifically, C&L argues that the only allegations of fraudulent misrepresentations in Plaintiffs' Complaint, as they relate to C&L, occur in reference to Cascade's 1991 10-K form, which C&L did not prepare.

Plaintiffs respond by arguing that their Complaint sufficiently demonstrates that C&L was not a minimal participant in the auditing of Cascade, but in fact gave extensive advice to Cascade. Plaintiffs argue as evidence of C&L's liability the fact that C&L failed to issue "going concern" opinions on Fran's and Conston despite "red

flags" that Cascade was in financial difficulty, and that C&L failed to consolidate Conston's financial statements with Cascade's, thus allowing Cascade to avoid reporting Conston's significant losses, in violation of established accounting procedures. Furthermore, after C&L received Cascade's 10-K, it failed to withdraw its opinion on Fran's or Conston despite the gross errors it knew were contained in the 10-K.

A. S10(b) and Rule 10b-5

1. Duty to Disclose

Defendant Coopers & Lybrand argue that, like the defendant law firms, an accounting firm also has no duty to disclose negative information about a company to the public when the accounting firm did not participate in preparing the financial statements of the main corporation (here, Cascade), but only participated in preparing the financial statements of two of the corporation's subsidiaries. More importantly, C&L argues that it did not aid in the preparation of Cascade's 1991 10-K form which stated, erroneously, that Cascade owned 126 Fran's stores. Therefore, C&L bad no duty to disclose any of the alleged fraud, as it was not the perpetrator of any of the fraud.

This position, however, is contrary to the applicable precedent in the Eleventh Circuit. In Rudolph, the court denied a motion to dismiss filed by an accounting firm on the grounds that an accountant stands in a "special position of trust vis-a-vis the public," noting that an accountant has a "duty to safeguard the public interest." Rudolph, 800 F.2d at 1044. Because the public relies on an accountant's representations when making fraudulent decisions, and because the costs to an accountant of revealing potentially negative information is minimal, the accountant has a duty to disclose this information when preparing other accounting documents which rely on this negative information, regardless of whether it originally prepared the misleading documents. Plaintiffs are not arguing, as C&L believes they are, that an auditor of a subsidiary will always be liable for the fraud of the parent. However, when the auditor of a subsidiary knows of the fraudulent activities of the parent, it has a duty to disclose this information.

Accordingly, although C&L did not prepare Cascade's 1991 10-K form, Plaintiffs have demonstrated a set of facts which, if true, would entitle them to relief. By failing to disclose the false information contained in Cascade's 1991 10-K, which C&L knew to be false, C&L violated the duty to disclose negative information to the public recognized by Rudolph.

2. Reliance

In order for Plaintiffs to adequately allege a securities fraud violation against any defendant, they must allege that Plaintiffs somehow relied on the misrepresentations or omissions of that defendant. Ross v. Bank South, N.A., 885 F.2d 723, 728 (11th Cir. 1989), cert. denied, 495 U.S. 905 (1990). To satisfy this element, Plaintiffs allege the "fraud on the market" theory, which basically creates a presumption of reliance, when no individual reliance can be demonstrated, by accepting that, in a developed securities market, the material information published by the defendant is reflected in the price of the stock. See Basic Inc. v. Levinson, 485 U.S. 224, 241-42 (1988); Lipton v. Documation, Inc., 734 F.2d 740, 745-46 (11th Cir. 1984), cert. denied, 469 U.S. 1132 (1985). The Magistrate Judge accepted this theory to satisfy the element of reliance.

C&L objected to this finding of reliance, stating that at no time did they ever make public statements about Cascade, but only about the subsidiaries Fran's and Conston. However, Plaintiffs argue that by not revealing information that C&L had a duty to reveal, C&L contributed to the fraud on the market which led to the increased price of Cascade's stock. This allegation, if taken as true, would set forth adequate evidence of reliance through the fraud on

the market theory, and, therefore, Plaintiffs have met their burden as to this element.[114]

As Plaintiffs have established sufficient support for all the elements of a primary violation of 10(b) and Rule 10b-5, this count will not be dismissed as to C&L.

B. Aiding and Abetting

Plaintiffs also allege that C&L aided and abetted the violation of the securities laws. The Magistrate Judge, citing to Plaintiffs' allegations that C&L knew that Cascade was representing that it had more Fran's stores than it did, that it avoided consolidating the Conston financial statements with Cascade's, and that it knowingly violated established accounting procedures, recommended that this count against C&L should not be dismissed. C&L objects to this recommendation by stating that since it was not Cascade's auditor, it could not have knowledge of nor participate in any fraud. Furthermore, Plaintiffs do not have standing to

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114. C&L argues that since they did not have a duty to disclose, and since they could not have made misrepresentations or omissions about Cascade, but only about Cascade's subsidiaries, Plaintiffs cannot demonstrate transaction or loss causation. As the Court has found that a duty to disclose could exist, and that C&L may have failed to disclose information that it had a duty to disclose, the Court has no hesitancy in finding that Plaintiffs have alleged that the actions of C&L encouraged them to invest (transaction causation) and contributed to their economic harm (loss causation). See Sahlen, 773 F. Supp. at 359-60.

sue as the audit reports were of the subsidiaries and not of Cascade.

However, as has been previously discussed, Plaintiffs have alleged sufficient facts, such as their active attempts to avoid consolidating Conston and their failure to disclose relevant information after the publication of the 1991 10-K, that C&L knowingly and substantially participated in the fraud. Therefore, the motion to dismiss should not be granted. Merely because C&L did not publish the 1991 10-K does not mean that they could not know of the fraud and actively aid in perpetuating it through the other enumerated activities.

V. DELTEC ASSET MANAGEMENT

Plaintiffs have not asserted a S10(b) or Rule 10b-5 allegation against Defendant Deltec, but instead have alleged both an aiding and abetting violation, as well as S12 violations, against Deltec. Deltec, in its objection to the Magistrate Judge's Report and Recommendation, requests that Count I of the Complaint be dismissed insofar as it seeks to impose primary liability against Deltec for S10(b) and Rule 10b-5 violations. As Plaintiffs do not object to this request, and as no allegations of a primary violation against Deltec are made in the Complaint, the part of Count

I that alleges a primary violation against Deltec is DISMISSED.

A. Aiding and Abetting

The Magistrate Judge found that Plaintiffs had pled sufficient evidence of knowledge on the part of Deltec to prevent the claim for aiding and abetting from being dismissed. Specifically, the Complaint alleges that Deltec knowingly received unauthorized shares of stock from Cascade, which it then sold on the open market.

Deltec argues that Plaintiffs must plead with specificity "conscious intent" on the part of Deltec that it was participating in the fraud in order to survive a motion to dismiss, and that the mere ignoring of "red flags" is not sufficient activity to reach the high degree of knowledge required. However, Plaintiffs' Complaint specifically alleges that Deltec knew that a large number of unauthorized shares had been issued by Cascade, knew that these shares were not transferable, yet sold those shares on the open market, which aided and abetted the overall scheme. (Compl. P224, 226). If true, these allegations establish the sufficient degree of knowledge on the part of Deltec, and at this stage in the proceedings, dismissing this count is unwarranted.

B. Section 12

Plaintiffs have also sued Deltec under Sections 12(1) and 12(2) of the Securities Act of 1933.[115] The Magistrate Judge recommended that these counts should not be dismissed, as Deltec sold securities of value to some of the class

plaintiffs through an initial offering which was accompanied by a prospectus that contained misstatements or omissions. Deltec objects, arguing that the Complaint fails to indicate that any plaintiff bought shares of Cascade from Deltec, that no prospectus was issued, and that Deltec did not sell these shares through an initial offering.

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115. 15 U.S.C. S77l, Civil liabilities arising in connection with prospectuses and communications, provides that:

> Any person who--
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> (1) offers or sells a security in violation of section 77e of this title, or
>
> (2) offers or sells a security. . .by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing the security from him. . . .

Plaintiffs adequately allege in their Complaint that one or more of the class plaintiffs may have bought shares from Deltec. (See Compl. P403). This is sufficient to meet this element of a S12(1) cause of action.

Plaintiffs also have clearly alleged in their Complaint that Deltec's January 4, 1990, prospectus failed to allege that the shares it was offering were unauthorized. (Compl. P409). If true, these allegations meet the requirements of a S12(2) violation.

Deltec further argues that Plaintiffs must allege reliance by the purchasing plaintiff on the prospectus. However, in Currie v. Cayman Resources Corp., 835 F.2d 780, 782 (11th Cir. 1988), the Eleventh Circuit held that " `plaintiffs need not prove that they relied in any way on the alleged misrepresentations or omissions.' " (quoting Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 695 (5th Cir. 1971). Consequently, Plaintiffs need not show reliance on the actual prospectus but must only show that Deltec's prospectus contained misrepresentations or omitted material facts in order for Plaintiffs to maintain a S12(2) cause of action. As Plaintiffs have alleged that there were inaccuracies in the prospectus, this count should not be dismissed on the grounds of inadequate allegations of reliance.

Deltec also argues that S12(2) only applies to sellers of stocks during an initial offering. Plaintiffs have alleged that Deltec's sales through the January 4, 1990, prospectus were initial offerings to the public and that Deltec sold unregistered shares received from Cascade directly to Plaintiffs. These allegations, if true, are sufficient to allege that the shares at issue were purchased by Plaintiffs from Deltec through an initial offering.

Finally, Deltec argues that Plaintiffs have not alleged fraud with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure. However, the Complaint does specify the fraud Deltec allegedly engaged in through the selling of unauthorized shares and the failure to mention this in their prospectus. The Court finds that this is sufficient specificity under Rule 9(b) to withstand a motion to dismiss at this stage of the proceedings.

As Plaintiffs have adequately alleged all elements of S12 violations, this count of the Complaint shall not be dismised.

VI. RAYMOND JAMES

The Magistrate Judge recommended that the counts for primary and secondary violations of S10(b) and Rule10b-5 against Raymond James, the securities broker, should not

be dismissed. Plaintiffs have alleged that Raymond James issued misleading reports about the number of stores Cascade operated and about the strength and prospects of the corporation.

A. Primary violations

Raymond James argues that because the omissions in their reports were not material, and because Plaintiffs have failed to allege the requisite scienter, the count for primary violations of the securities laws should be dismissed.
First, Raymond James asserts that its omissions were not material because the omitted facts were part of the "total mix" of information available to the public. Whether the omissions were material or were part of the "total mix" of information in the market is not a decision to be made at the motion to dismiss stage, and is better reserved for, as the Magistrate Judge found, a motion for summary judgment.

Second, as the Magistrate Judge found, the Complaint adequately alleges the "severe recklessness" required in a S10(b) count. See McDonald v. Alan Bush Brokerage Co., 863 F.2d 809, 814 (11th Cir. 1989) ("the rule of this Circuit is that a showing of `severe recklessness' satisfies the scienter requirement"). Plaintiffs state that Raymond James represented that it had undertaken an extensive inde-

pendent investigation of Cascade prior to recommending the company's securities, and that it had continuously reassessed its evaluation of the company. (Comp. PP158, 159.)

B. Aiding and Abetting

While the Magistrate Judge did not extensively review the aiding and abetting count as it applied to Raymond James, the Court finds that he was correct in his recommendation that the count should not be dismissed. Plaintiffs have adequately alleged sufficient activity on the part of Raymond James to indicate the requisite scienter necessary to maintain an aiding and abetting allegation. Specifically, Raymond James engaged in touting stock in a company which it said it had researched, when, in fact, that company was in severe financial trouble and had issued a fraudulent 10-K. At the motion to dismiss stage, it is premature to dismiss this count because, if true, the Plaintiffs may prevail.

VII. STATE LAW CLAIMS

While the pendant state law claims for fraud and negligent misrepresentation may be dismissed against Defendants K&S and GY&S, because the federal cause of action against these defendants are no longer viable,[116] the

pendent state law claims should also be dismissed, as well as the similar counts against all Defendants, for failure to state a claim upon which relief can be granted.

A. Fraud

As the Magistrate Judge correctly determined, one of the elements of common law fraud in Florida is reliance by Plaintiffs on the false representations of the Defendants. Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985). However, Florida does not recognize a "fraud on the market" theory to establish reliance, but requires allegations of actual reliance. Sahlen, 773 F. Supp. at 371. As in Sahlen, the Complaint here fails to allege actual reliance by Plaintiffs on specific representations made by Defendants, but instead only alleges the more general reliance on the market as a whole, which is effected by the false representations of Defendants. Accordingly, the count for fraud as to all Defendants must be dismissed.

B. Negligent Misrepresentation

Actual reliance is also one of the elements for a negligent misrepresentation cause of action. See Atlantic

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116. See cases cited infra section III.D.

Nat. Bank of Florida v. Vest, 480 So. 2d 1328 (Fla. 2nd Dist. Ct. App. 1985), rev. denied, 491 So. 2d 281 (Fla. 1986). As the Magistrate Judge determined, no allegation in the Complaint states that any Defendant made its negligent misrepresentation with the intent that Plaintiffs would rely on that representation in purchasing Cascade stock. Therefore, the negligent misrepresentation count against all Defendants must also be dismissed.

VIII. CONCLUSION

Accordingly, it is hereby ORDERED and ADJUDGED that:

1. Defendant Deltec Securities Corporation's Motion to Dismiss, filed September 16, 1992 (D.E. #128), is DENIED in part and GRANTED in part. Count I of the Consolidated Amended Class Action Complaint is DISMISSED only insofar as it seeks to impose primary liability against Deltec for S10(b) and Rule 10b-5 violations. Count V (Negligent Misrepresentation) and Count VII (Fraud) of the Consolidated Amended Class Action Complaint are DISMISSED as to Defendant Deltec Securities Corporation.

2. Defendant Gunster, Yoakley & Stewart, P.A.'s Motion to Dismiss is GRANTED. Accordingly, Counts I, V

and VII of the Consolidated Amended Class Action Complaint are DISMISSED as to Defendant Gunster, Yoakley & Stewart, P.A.

3. Defendants Aaron Karp, Howard Sommers, and Karp and Sommers's Motion to Dismiss is GRANTED. Accordingly, Counts I, II, III, IV, V, and VII of the Consolidated Amended Class Action Complaint are DISMISSED as to Defendants Aaron Karp, Howard Sommers, and Karp and Sommers.

4. Defendant Coopers & Lybrand's Motion to Dismiss is DENIED in part and GRANTED in part. Only Count V (Negligent Misrepresentation) and Count VII (Fraud) of the Complaint are DISMISSED as to Defendant Coopers & Lybrand.

5. Defendant Raymond James's Motion to Dismiss is DENIED in part and GRANTED in part. Only Count V (Negligent Misrepresentation) and Count VII (Fraud) of the Consolidated Amended Class Action Complaint are DISMISSED as to Defendant Raymond James.

DONE and ORDERED, in chambers, Miami, Florida, this 15th day of December, 1993.

102 Stat. 662, 28 U.S.C. Section 1257 (June 27, 1988)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATE OF FLORIDA }
MARION COUNTY } **ss.:**

I hereby certify that the foregoing are excerpts from true copies of the materials referenced.

/s/William A. Calvo, III/s/
William A. Calvo, III

SWORN TO BEFORE ME, an official duly authorized to administer oaths, this 15th day of September, 1994, by William A. Calvo, III, to me known.

/s/_____/s/

Notary Public